

BIENNIAL REPORT
of the
ATTORNEY GENERAL
STATE OF FLORIDA

From January 1, 1945, to December 31, 1946

J. TOM WATSON
ATTORNEY GENERAL



Tallahassee, Fla.
1946

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THIS BIENNIAL REPORT CONTAINS:

1. Material required by Article IV, Section 27, of our state constitution to be made by each officer of the executive department to the governor at the beginning of each regular session of the legislature; and,
2. The material required by Section 16.05, Florida Statutes, 1941, to be submitted in a written report to the governor presenting the effect and operation of the acts of the last previous session of the legislature (being the 1945 session), and any court decisions thereon.

This book will be divided into three parts and an appendix, the three parts to be designated as Parts I, II and III, table of contents for which appears on pages to hereof.

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OFFICE OF THE
ATTORNEY GENERAL
STATE OF FLORIDA
TALLAHASSEE

January 1, 1947

J. TOM WATSON
ATTORNEY GENERAL

LETTER OF TRANSMITTAL

TO HIS EXCELLENCY,
HONORABLE MILLARD CALDWELL,
GOVERNOR OF FLORIDA.

SIR:

In compliance with Section 16.05, Florida Statutes, 1941, directing the attorney general to make a written report to the governor concerning the effect and operation of the acts of the last previous session of the legislature (being the 1945 session), and any court decisions thereon, with such suggestions as within the opinion of the attorney general the public interest may demand, I have the honor to submit my 1947 report for the two preceding calendar years, 1945-1946, with such suggestions as in my opinion the public interest calls for. This is Part I of this book and deals with (a) the constitutional amendments adopted at the 1944 general election; (b) the constitutional amendments proposed at the 1945 session of the legislature and adopted at the 1946 general election; (c) the 1945 legislative enactments of general operation and interest; and (d) court proceedings and decisions had and rendered during the biennium, which relate to or arise out of the above constitutional amendments and legislative enactments, which are of unusual interest.

In compliance also with Section 27, Article IV, of the state constitution, directing that each officer of the executive department make full report of his official acts, of the receipts and expenditures of his office, and the requirements of the same, to the governor at the beginning of each regular session of the legislature, or whenever the governor shall require it, I further submit herewith the report of the administration and operations in my office for the two calendar years immediately preceding the 1947 regular session of the legislature, being the period from January 1, 1945 to December 31, 1946, inclusive. This is Part II of the book. The opinions of the attorney general rendered during the biennium are Part III of the book.

In making my report under the constitutional provision aforesaid, I submit the following:

1. A statement giving the general scope of my duties along with a list of the departments, commissions and boards of which I am a member.
2. A statement showing the general scope of work of the Statutory Revision Department of my office.
3. A compiled statement of the cases handled by the attorney general's office during the biennium.
4. Extradition statistics presenting cases for extradition reported on to the governor by the attorney general during the biennium.

5. The receipts and expenditures of the attorney general's office for the biennium with an itemized statement of my appropriations and expenditures.

6. The collections made by the attorney general's office during the biennium.

7. A list of the attorneys general of this state since 1845.

8. A list of the boards, commissions and bureaus of the state, for many of which the attorney general acts as attorney and legal advisor.

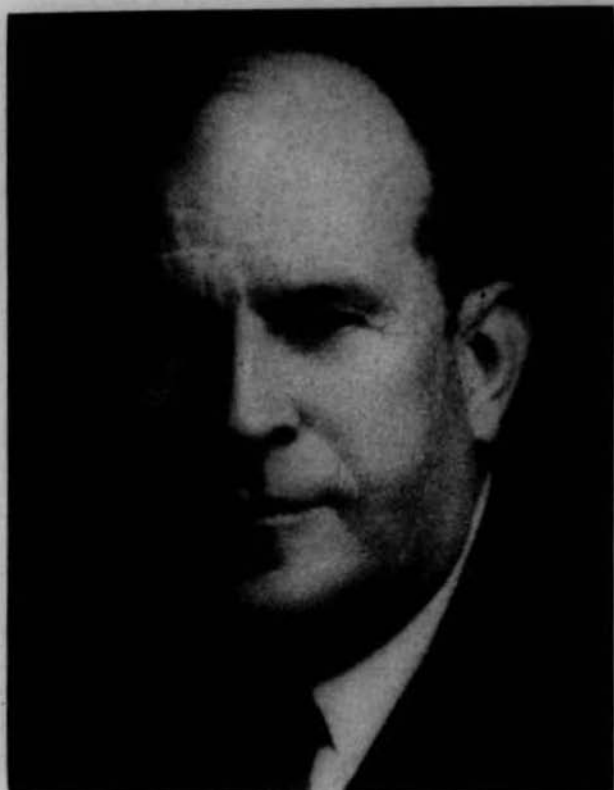
9. The legal opinions (Part III of this book) rendered by the attorney general in writing during the biennium, except those which are repetitious or of such casual character as not to be of general interest. The excepted opinions are of record in the office of the attorney general, indexed so as to be available to the public upon request.

I have taken the liberty of listing, in Part II of this report, the personnel of my office, the membership of the Supreme Court of the State, the names and circuits of the Circuit Judges of the State, the names of the Judges of the Court of Record of Escambia County, the Criminal Courts of Record, the Court of Crimes of Dade County, the Civil Courts of Record, the Juvenile Courts and the County Judges, the names and circuits of the State Attorneys and Assistant State Attorneys of the State and the names and counties of the County Solicitors, Assistant County Solicitors and County Prosecuting Attorneys.

I am also submitting, as an appendix to the book, reports obtained from the Circuit Clerks of the State, the Clerk of the Court of Record of Escambia County and the Clerks of the Civil Courts of Record of the cases handled in their courts and reports obtained from the State Attorneys and County Solicitors of the State showing the cases handled by the Criminal Courts of Record and the Court of Crimes of the State.

Respectfully submitted,

J. TOM WATSON,
Attorney General.



In Memoriam

GEORGE COUPER GIBBS

Born—Jacksonville, Florida, October 28, 1879.

Died—Jacksonville, Florida, September 17, 1946.

George Couper Gibbs was born in Jacksonville, Florida, October 28, 1879, and died of a heart attack at his home in the city of his birth on September 17, 1946, at the age of sixty-six. Interment was made in Evergreen Cemetery, Jacksonville. Immediate survivors are his widow, two daughters, Mrs. William Worthington, Kent, Connecticut, Mrs. Asa B. Gardiner, Baltimore, Maryland, and a son, William W. Gibbs of Miami, Florida.

George Couper, son of George Williams and Margaret Watkins Gibbs, was the son of a family long identified with Florida history, and from his early youth he was destined to carry

on this distinguished tradition. His grandfather, George Couper Gibbs, was a colonel in the Confederate Army, and was mayor of Jacksonville in 1857. His great-grandfather, George Gibbs, was first clerk of the eastern district of the territory of Florida at St. Augustine, having been appointed by President James Monroe in 1822.

Although extreme studiousness characterized his youth and remained a dominant characteristic throughout his long and useful life, still at an early age he was inclined toward a military career. He became a member of the St. Augustine Rifles, and volunteered at the outbreak of the Spanish-American war and served with Company G of the First Florida Volunteer Infantry until the end of the war. He received an appointment to West Point Military Academy, passed the competitive examinations and won a competitive scholarship, but because of a slight physical disability, he was unable to enter the Academy.

After receiving his early education in schools at St. Augustine where his family had moved in 1881, George Couper Gibbs entered Washington and Lee University at Lexington, Virginia, in 1901, where he received the degree of Bachelor of Law in 1903. He was then admitted to practice in Virginia and in Florida. He entered the office of A. W. Cockrell and Son in Jacksonville, with which firm he was associated until 1907. From 1907 to 1912 he practiced law alone.

On October 14, 1908, he married Miss Lenora Warnock of Jamaica, Long Island, New York.

On December 3, 1912, upon the recommendation of the bar of Duval county, he was appointed circuit judge under the constitutional amendment adopted that year which provided for an additional circuit judge for Duval county. He held this office until April 1913 when he resigned to accept the appointment as judge of the Fourth Judicial District, succeeding Judge Rhydon M. Call. In June 1916 he was nominated in the Democratic primary and in 1917 was appointed for a full term to succeed himself. He remained as judge until 1935. In 1935, having been on the circuit bench 23 years, and having declined to again become a candidate, he retired from office and resumed the private practice of law. In May 1938, following the death of the Honorable Cary D. Landis, attorney general of the State of Florida, he was appointed by Governor Fred P. Cone to fill the vacancy. At the end of the term, in January 1941, having decided not to again seek nomination and election as attorney general, he returned to the private practice of law in Jacksonville. During 1942 and '43 he was chief attorney for the Florida Office of Price Administration in various matters involving the compliance with and enforcement of the law regarding price control, rationing, etc. In June 1946, following the death of the Honorable DeWitt T. Gray, Judge Gibbs was offered the judgeship of the Fourth Judicial Circuit by Governor Millard Caldwell, but he declined to accept it.

Judge Gibbs was a member of the American, the state and the Jacksonville Bar Associations, having been the first secretary of the Florida State Bar Association. He was a member of Phi Kappa Psi Fraternity and an honorary member of Phi Delta Phi legal fraternity.

In spite of his extremely busy judicial life, Judge Gibbs found time to take an active part in church and civic affairs of his community. He was a member of the Riverside Presbyterian Church in Jacksonville, and of its board of trustees. He was an active member of the Florida Yacht Club, the Seminole, Timuquana, and Civitan Clubs, having served as president of the latter club in 1938.

For almost twenty years he was an active member of the North Florida Council of Boy Scouts of America, serving as commissioner for ten years. A project of vital interest to him during his last few years was the Inter-racial Committee of Jacksonville, of which he was a member. When the Brewster Hospital Advisory Board was organized, he was elected chairman and served in this capacity until his death. Although his special interest was centered on the development of the School of Nursing and a more adequate medical staff, all departments of the hospital were strengthened under his guidance so as to serve more effectively the negro population of the Jacksonville area.

In presenting this In Memoriam, I do so with the deepest feeling of appreciation for his personal friendship and for the help and assistance so generously given me by him who was my predecessor in the office of attorney general of our state, in making known to me as I entered upon the duties of this office in 1941, following his retirement, many of its formal and informal workings and fields of service and responsibility. As he went out of the office of attorney general and I came in, he made available to me in every possible way his knowledge and experience concerning the duties and responsibilities of the office and gave me invaluable assistance in such connection.



In Memoriam

JAMES MARTIN LEE

Born—Irwin County, Georgia, February 21, 1881.

Died—Tallahassee, Florida, October 6, 1946.

James Martin Lee was born February 21, 1881, in Irwin county, Georgia, and died suddenly of a heart attack at his home in Tallahassee, Florida, October 6, 1946, while serving his fourth term as comptroller of the State of Florida. Interment was made in Oakland cemetery in Tallahassee, Florida. Immediate survivors are his widow, three daughters, Mrs. Ronald Brough of Port St. Joe, Florida, Mrs. W. A. Maddox of Lakeland, Florida, Mrs. Arch Livingston of Tallahassee, Florida, and one son, James Martin Lee, Jr., of Tallahassee, Florida. James Martin Lee was known to many as Jim Lee and as Colonel Lee.

He was born on a farm in Irwin county, Georgia, but spent his early boyhood in Irwinville, Georgia, where his father, James J. Lee, was county ordinary. Because of his father's position he, at an early age, became interested in the law and things political.

He was graduated from the Irwinville High School, and in 1903 married Mary Alice Clements, also a resident of the same county. At the time of his marriage he was engaged in the mercantile business in Irwinville, but shortly thereafter became manager of a mercantile business in Mystic, Georgia, where he resided until the death of his father. When he was twenty-three years of age his father died and he was appointed administrator of his estate. After his appointment as such administrator he returned to Irwinville. He was elected to serve the unexpired term of his father as county ordinary and was elected to succeed himself, becoming the youngest ordinary to serve in the State of Georgia. He was also postmaster while serving as county ordinary, served also as railroad agent and operated a warehouse. However, his health began to weaken under these multiple duties and he was forced to abandon practically all of his activities. Being advised, by his doctor, to get out in the open, he became a rural mail carrier. As the mail route emanated from the Mystic post office he moved back to Mystic.

After moving back to Mystic he, gaining a legal education after the pattern set by Abraham Lincoln, 'read' law under the able guidance of Judge Martin, of Hawkinsville, Georgia, and at the end of two years was admitted to the Georgia bar. After his admission to the bar he practiced law in Mystic, Georgia, for a while, at the same time operating a drug store, serving as a member of the board of county commissioners of Irwin county, and as mayor of Mystic. He later established a law office in Ocilla, Georgia, it having been designated as the county seat of Irwin county. His name plate still appears on the door of his first law office in Ocilla.

In January 1923 he moved to Highlands county, Florida, taking up residence at Sebring, where he formed a law partnership with Judge A. E. Lawrence, under the firm name of Lawrence and Lee, with offices in Sebring and Avon Park, he moving to Avon Park to conduct the office there. This partnership continued until Mr. Lawrence became county judge of Highlands county, after which he opened his own office in Avon Park.

Between 1924 and 1927 he served as tax collector, prosecuting attorney and attorney for the board of county commissioners of Highlands county, and as city attorney for the cities of Avon Park, Lake Placid and DeSoto City. In 1927, 1929 and 1931 he represented Highlands county in the state legislature. In 1932 he was elected state comptroller and entered upon the duties of that office in January 1933.

He assumed office as state comptroller during the time the 1933 bank cataclysm of the nation was taking place, the President of the United States closing for several days all of the nation's banking institutions. Under his guidance as comptroller the attempt to save and rehabilitate the banks of this state was a successful one. He was the first to use

the plan of a general liquidator; in consequence of this system he was credited with unusually efficient and economical termination of state bank liquidation in Florida.

He successfully defeated strong opponents for the comptroller's office in 1936, 1940 and 1944, which victories presented real testimonials from the people of his popularity.

He was ever a colorful public figure during his long tenure of office as comptroller of this state, which he held until October 1946 without interruption. He was known throughout his period of service as a strong and effective public servant, always mindful of the public welfare. His official conduct was firm; when he believed himself to be right, he clung tenaciously to his position and never gave up conviction for political expediency.

He was a member of the Florida State Bar Association, a thirty-second degree Mason, a Shriner, a Knight Templar, an Elk, and a member of the Kiwanis club of Tallahassee. He was an active member of the Baptist Church, having served as superintendent of his Sunday School and deacon of his church.

In his loss I feel that there passed from state government one of those entitled to be credited with having contributed much in the administration of the comptroller's office for a period of longer than thirteen years in giving to our state a service of outstanding quality and of superior public benefit. With his other contemporaries in the cabinet or our state government, I am sure I speak the sentiments of all of us by saying that he has been and will continue to be greatly missed among us.

PART I

-A-

1944 CONSTITUTIONAL AMENDMENTS

The legislature of 1943 submitted ten proposed amendments to the Florida Constitution to be voted on at the general election in 1944, one of which was eliminated by court decision prior to the said election (*City of Coral Gables v. Gray*, Secretary of State, 154 Fla. 881, 19 So. 2d. 318), two were defeated at the said general election and seven were adopted. The seven amendments, which were adopted, appear on pages 493-497 of the 1945 Cumulative Supplement to Volume I, Florida Statutes, 1941, and are as follows:

(1) Amendment to Section 12 of Declaration of Rights, commonly known as the right-to-work amendment.

(2) Article V, Section 21. This amendment relates to justices of the peace and their districts.

(3) Article V, Section 47. This amendment relates to the election of state attorneys, judges of criminal courts of record and county solicitors.

(4) Article VIII, Section 5. This amendment relates to county commissioners, the number of districts and the term of office.

(5) Article VIII, Sections 11 and 12. These amendments relate to tax assessors and tax collectors in Hillsborough county.

(6) Article IX, Section 1. This amendment relates to rates of taxation on intangible personal property.

(7) Article XVIII, Sections 6 and 7. These amendments relate to terms of office to fill vacancies in elective offices.

The proposed amendment, eliminated by court decision as above, proposed an addition to the state constitution, providing for the consolidation of certain county and municipal offices in Dade and Orange counties, to be designated as Sections 1 to 9, inclusive, of Article XX thereof. The court, in the above cited case, held that the contents of the proposed amendment violated fundamental constitutional requirements that such amendments relate only to one plan or scheme. It held that the proposed amendment submitted contained more than one such plan or scheme so essentially unrelated as to make any association of them purely artificial.

One of the proposed amendments defeated at the 1944 election was the proposal to amend Section 3, Article VII, of the constitution, relating to the apportionment of senators and representatives in the legislature and creating three additional senatorial districts, the other related to the establishment of a uniform system of county and municipal government.

Section 12, Declaration of Rights.—The last sentence of this section was added by the 1944 amendment, the remainder of the section is identical with the section before amendment. The said last sentence is as follows, "The right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer." Only cases involving the last sentence above quoted will be here considered.

In the case of *American Federation of Labor v. Watson*, D. C. Fla., 60 Fed. Supp. 1010, a three-judge federal district court held the amendment to be valid stating that "The assaulted amendment undertakes to preserve to employees, in full vigor, the right of collective bargaining. Instead of preventing or abridging the rights of speech, press, assembly, and petition, the amendment seeks to preserve it to those who do not join a labor union as well as to those who do. . . . The amendment is not in violation of the First Amendment to the Federal Constitution. The same is true of the allegations as to its violation of the Fourteenth Amendment. There is no prohibition against a citizen belonging to any union that he chooses, but the prohibition seems to be against requiring membership in the union in order for a citizen to be eligible for work. . . . The Florida constitutional amendment prohibits no one from joining a union but undertakes to declare that it shall not be a condition precedent to the right to work. It does not deny the labor union member the equal protection of the law, but appears to be designed to give to the non-union worker a protection of law which he had not theretofore enjoyed. . . . the Florida constitutional amendment does not contravene any provision of the Federal Constitution and for aught that now appears it is a valid exercise of the police power of the State of Florida. . . . So long as the right to organize into a union and to bargain collectively is not abridged, there is no denial of freedom of speech, press, assembly, and petition. Whatever was traditionally a part of the process of collective bargaining seems to have been left unabridged by the second clause in the amendment."

The above decision by the three-judge district court was appealed from that court to the Supreme Court of the United States (*American Federation of Labor v. Watson*, 327 U. S. 582, 66 S. Ct. 761, 90 L. Ed. Adv. 715), which reversed the judgment of the district court and remanded the cause to it with directions to retain the bill pending the determination of the proceedings in the state court in conformity with the opinion of the Supreme Court of the United States in the above cited case. In the course of its opinion the Supreme Court of the United States said that the constitutional amendment involved "may be so construed as to eliminate any conflict alleged to exist between it and the National Labor Relations Act." The Supreme Court of the United States in this case refused to hold the constitutional amendment involved to be invalid. The validity and operative effect of the Florida right-to-work constitutional amendment was upheld in the above decision by the Supreme Court of the United States.

Although the constitutional amendment under consideration was quoted by the Supreme Court of Florida in the case of *State v. Dade County Roofing Company*, 156 Fla. 260, 22 So. 2d. 793, the court stated that the information before it made "no allegation that any person or persons have been denied the right-to-work on account of membership or nonmembership in any labor union or labor organization since the adoption of the amended section." The court refused to decide whether or not such an allegation would have been sufficient basis for a court proceeding.

In the case of *Miami Waterworks Local No. 654 v. City of Miami*, Fla. . . . 26 So. 2d. 194, the court, concerning the constitutional amendment under consideration, said: "It will be observed that this section of the Constitution does not give the right of collective bargaining to any group. The proviso of the section is merely an expression of the popular will that if the right of collective bargaining is given, an assertion of the rights contained in the main clause of the section shall not operate to deny or abridge the right to bargain collectively."

Section 21, Article V.—This amendment limits the number of justice of the peace districts in each county and authorizes the legislature, upon referendum vote by the people of the county, to change or abolish any such district. Formerly justice of the peace districts were determined by the county commissioners. There have been no decisions of the supreme court involving this section.

Section 47, Article V.—This amendment provided for the election by the people of state attorneys, judges of the criminal courts of record, and county solicitors, who prior to this amendment were appointed by the governor and confirmed by the senate. There have been no decisions of the supreme court involving this section.

Section 5, Article VIII.—This amendment in effect changed the term of county commissioners from a two-year term to a four-year term. The section also requires that the boards of county commissioners of the several counties redistrict their counties from time to time so as to keep such districts as nearly equal as possible in proportion to population. In the case of *Prince v. State*, Fla., 25 So. 2d. 5, the court held that proceedings in mandamus may be resorted to to coerce the boards of county commissioners to perform their duty of dividing the county into districts as nearly equal in proportion as possible.

Sections 11 and 12, Article VIII.—These sections should have been numbered 12 and 13, as a Section 11 had been added at the general election in 1942. These sections provide for the consolidation of certain county and municipal offices in Hillsborough county and the assessment and collection of county and municipal taxes by the same officials. There have been no decisions of the supreme court involving these sections.

Section 1, Article IX.—This section as amended at the 1944 general election merely changed the amount of the intangible personal property assessment from not more than five mills to not more than two mills on the dollar of valuation. Although there appear to have been some court decisions involving this section and intangible personal property taxes, none of them involved the change made by this amendment.

Sections 6 and 7, Article XVIII.—These sections provided that appointments to fill vacancies in elective offices under the state constitution shall be until the first Tuesday after the first Monday in January next after the following general election and that elections to fill such vacancies should be from such date. Prior to the amendment such appointments were until the next general election and such elections were to fill such vacancies from such elections. There have been no decisions of the supreme court construing these sections; however, in an Opinion to the Governor, Fla., 27 So. 2d. Adv. 409, the court did hold that these sections did not provide for the filling of a vacancy in the office of United States Senator by an election and that the governor might fill such vacancy for the unexpired term by appointment.

—B—

1946 CONSTITUTIONAL AMENDMENTS

The legislature of 1945 submitted six proposed amendments to the Florida Constitution to be voted on at the general election in 1946, five of which were defeated at the said election and only one adopted. So far as I am advised, there have been no court decisions affecting this amendment since its adoption.

Sections 1 and 2, Article XX.—The amendment adopted is known as Sections 1 and 2, Article XX, of the state constitution, but relates to

Orange county and is not of general operation and interest throughout the state. These sections provide for the consolidation, abolishing and creating of certain county offices in Orange county and for the assessment and collection of municipal taxes assessed in the county by the county taxing officials. This amendment does not appear to be self-executing and seems to require legislation, which becomes effective only after approval by a county-wide referendum.

The proposed amendments which were defeated at the general election of 1946 are as follows:

Section 30, Article III.—This proposed amendment would have abolished most continuing appropriations and required that most all appropriations be included in the general appropriations bill, which could not have been for more than two years under any enactment.

Section 48, Article V.—This proposed amendment would have provided for the election of the judge and county solicitor of the court of record for Escambia county. They are now appointed by the governor and confirmed by the senate.

Sections 12 and 13, Article VIII.—This proposed amendment would have renumbered Sections 11 and 12 to the same article adopted at the general election in 1944 and amended them.

Sections 14 and 15, Article VIII.—This proposed amendment would have been applicable to Bay county and would have provided for the assessment and collection of all county and municipal taxes in said county by the county taxing officials.

Section 34, Article XVI.—This proposed amendment would have established the office of Director of the Budget in this state who would have been appointed by concurrent resolution of the legislature.

—C—

1945 ENACTMENTS OF GENERAL OPERATION

Section 10.01,* or Chapter 23,614, Laws of Florida, Acts of 1945. This statute reapportioned the state into state senatorial districts as required by the constitution. Although two applications have been made to the supreme court for writs of mandamus, by one of the senators whose district was abolished in the reapportionment of the state, there has been no opinion of the supreme court involving the validity of the redistricting, both of said applications having been denied without opinion.

Section 10.03, or Chapter 23,613, Laws of Florida, Acts of 1945. This statute reapportioned the membership of the house of representatives in accordance with the requirement of the constitution.

Sections 12.01 to 12.09, or Chapters 22,515 and 23,085, Laws of Florida, Acts of 1945. These statutes provided for the state census of 1945, which was taken as provided in and by said statutes.

Sections 16.19 to 16.23, or Chapter 22,858, Laws of Florida, Acts of 1945. This statute adopted and reenacted the Florida Statutes, 1941,

*Section references are to 1945 Cumulative Supplement to Florida Statutes, 1941.

including the laws of general operation of the 1941 and 1943 sessions of the legislature, at the same time correcting errors, etc., in the statutes. This law, including Chapter 22,000, Laws of Florida, Acts of 1943, which was a like law, has been referred to or applied in the following opinions of the supreme court of this state, or in the concurring opinions of the justices thereof, in the cases of *Cates v. Heffernan*, 154 Fla. 422, 18 So. 2d. 11; *Mahood v. Bessemer Properties*, 154 Fla. 710, 18 So. 2d. 775; *State v. Lee*, 156 Fla. 291, 22 So. 2d. 804.

Sections 25.03-1 and 25.03-2, or Chapter 23,098, Laws of Florida, Acts of 1945. This statute authorizes and empowers the supreme court of this state, by court rule, to provide for the receiving and answering of certificates from the several appellate courts of the United States, including the Supreme Court of the United States, upon questions of the construction of Florida Statutes and rules of general law in Florida, when there is no clear controlling precedent in the decisions of the Florida Supreme Court on such question. So far as I am advised, no rules have yet been made under the authority of this law nor has the court been called upon to answer any such certificates.

Sections 26.02, 26.05-1 and 26.07-1, or Chapters 22,813, 22,618 and 22,943, Laws of Florida, Acts of 1945. These statutes provide additional circuit judges for the first, fourth and sixth judicial circuits. See Advisory Opinion to Governor, 156 Fla. 55, 22 So. 2d. 458.

Sections 30.08 et seq., or Chapter 22,790, Laws of Florida, Acts of 1945. This statute consolidated Chapters 30 and 144, of the Florida Statutes, 1941, each relating to sheriffs. The purpose of the consolidation was to collect all the general statutes relating to sheriffs into one chapter for convenience and to prevent oversight of such laws.

Section 32.06, or Chapter 23,134, Laws of Florida, Acts of 1945. This statute provides for the substitution and assignment of circuit judges to criminal courts of record when such judges are disqualified or unable to serve. There has been no court decision upon this statute; however, the supreme court, in the case of *Cormack v. Coleman*, 120 Fla. 1, 161 So. 844, upheld a similar prior statute applicable to Dade county.

Section 37.20, or Chapter 22,587, Laws of Florida, Acts of 1945. This statute established the fees of constables the same as those provided in Section 30.23 for sheriffs.

Section 40.23, or Chapter 22,766, Laws of Florida, Acts of 1945. This section revised the method of summoning petit jurors and removed some uncertainty from prior laws as to whether or not jurors might be summoned by any method other than through the mails.

Sections 59.01 et seq., or Chapter 22,854, Laws of Florida, Acts of 1945. This statute consolidated Chapters 59 and 67, of the Florida Statutes, 1941, each relating to appeals to the supreme court, and amended said chapters so as to conform them to the present rules of the supreme court, which, in some particulars, conflicted with the statute. The purpose of this revision was to gather the statutes relating to appeals, under said Chapters 59 and 67, into one chapter and make them conform to the supreme court rules. This law was referred to in the case of *Fonell v. Williams*, 157 Fla. 673, 26 So. 2d. 800, where it was held that the statute did not repeal or amend by implication any of the other statutes relating specially to appeals. See also *Henderson v. Stevens*, 157 Fla. 640, 26 So. 2d. 656; *Cleary Brothers Construction Company v. Phelps*, 156 Fla. 463, 24 So. 2d. 51, citing sections of the amended statutes.

Section 62.33, or Chapter 23,091, Laws of Florida, Acts of 1945. This section revised, for the purpose of removing doubt, existing statutes as to service of process in proceedings for restoration of sanity. Process is now required to be served upon state attorneys, either personally or by mail.

Sections 76.32 to 76.38, or Chapter 23,137, Laws of Florida, Acts of 1945. These statutes provide for the levying of attachments on boats, vessels, etc., in the courts of this state and provide the venue and procedure in connection therewith.

Section 90.01, or Chapter 23,156, Laws of Florida, Acts of 1945. This amendment was for the purpose of extending the statute providing for the taking of oaths, affidavits and acknowledgments to judges and clerks of all courts of record instead of the particular courts formerly referred to. The original statute was enacted prior to the creation of the civil courts of record and the statutory court of record, which were not included in the former statute but were brought in by the 1945 revision and amendment.

Sections 92.30 to 92.32, or Chapter 22,866, Laws of Florida, Acts of 1945. This statute makes the findings of the War and Navy Departments that a soldier is presumed to be dead legal evidence in this state. It also makes findings that a person is missing in action likewise evidence in this state.

Sections 95.16, 95.17, 95.21 and 95.27, or Chapter 22,897, Laws of Florida, Acts of 1945. These statutes amended the existing laws concerning adverse possession under color of title and restated the requirements for same. Section 95.17 was referred to in *Sauls v. Martin*, 156 Fla. 624, 24 So. 2d. 41.

Sections 95.28 to 95.34, or Chapter 22,560, Laws of Florida, Acts of 1945. These statutes relate to limitations upon instruments encumbering real estate and provide for extension agreements concerning the same. These statutes appear to have made some change in pre-existing statutes concerning limitations upon mortgages and liens.

Section 99.07, or Chapter 22,739, Laws of Florida, Acts of 1945. This statute amended the existing statutes concerning the opening and closing of polls on days of election and provide that they should open at seven o'clock a. m. and close at seven o'clock p. m., thereby changing the closing time from sundown to seven o'clock p. m. This section was cited in *Bay County v. State*, 157 Fla. 47, 24 So. 2d. 714.

Section 99.16, or Chapter 22,626, Laws of Florida, Acts of 1945. This statute regulates the placing of proposed constitutional amendments upon ballots and voting on the same.

Sections 102.29-1, 102.31-1 and 102.56-1, or Chapters 22,627, 22,679 and 22,760, Laws of Florida, Acts of 1945. These statutes relate to filing fees and expense statements in connection with primary elections. The purpose appears to have been to clear up some misunderstandings concerning these matters.

Sections 102.35-1, 102.71 and 102.72, or Chapters 22,678, 22,729 and 23,006, Laws of Florida, Acts of 1945. These sections relate to nominations of candidates of certain administrative offices by minority political parties and the election of delegates to national conventions.

Section 103.21, or Chapter 22,545, Laws of Florida, Acts of 1945. This section prohibits the holding of bond elections along with other elections.

Sections 121.01 to 121.17, or Chapter 22,831, Laws of Florida, Acts of 1945. This statute sets up the State Officers and Employees' Retirement System. This statute was upheld as valid in the case of *State v. Lee*, Fla., 28 So. 2d. Adv. 104.

Sections 134.01 to 134.17, or Chapter 22,938, Laws of Florida, Acts of 1945. This statute set up a County Officers and Employees' Retirement System. This statute was upheld as valid in the case of *State v. Lee*, 157 Fla. 70, 24 So. 2d. 798.

Section 167.43-1, or Chapter 22,829, Laws of Florida, Acts of 1945. This statute authorizes municipalities to levy tax on certain public services, including the purchase of electricity, gas, water, telephone and other services.

Section 192.06, or Chapter 23,082, Laws of Florida, Acts of 1945. This statute amended existing Section 192.06, and especially subsection (3) thereof, so as to permit the taxation of the property in question by municipalities for certain special assessments. Said subsection (3) was held valid in *Rogers v. City of Leesburg*, Fla., 27 So. 2d. Adv. 70. See also *Saunders v. City of Jacksonville*, Fla., 25 So. 2d. 648; *Bancroft Investment Corporation v. City of Jacksonville*, Fla., 27 So. 2d. 162; and *Dr. William Howard Hay Foundation v. Wilcox*, 156 Fla. 704, 24 So. 2d. 237.

Sections 192.29 and 192.30, or Chapter 22,999, Laws of Florida, Acts of 1945. This amendment related to the vacation of platted lands and the assessment of the same as acreage.

Section 192.59, or Chapter 22,845, Laws of Florida, Acts of 1945. This statute authorizes the cancellation of county tax liens upon lands acquired or used for public road purposes.

Sections 194.47-1 to 194.47-4, or Chapter 22,870, Laws of Florida, Acts of 1945. This statute is new and relates to the sale or redemption of county tax delinquent lands. The main purpose of this statute seems to have been to permit the original owner to redeem or repurchase his property lost by him to the county through delinquent taxes when a hardship would be imposed upon the owner if not so permitted to redeem or purchase said property from the county. Section 194.47-2 was referred to in *Coughlin v. Broward County*, 156 Fla. 298, 22 So. 2d. 814, where the court said that "the facts in this case easily classify it as a 'hardship case' in the contemplation of" the above section.

Section 194.55, or Chapter 22,772, Laws of Florida, Acts of 1945. This statute amended in minor detail former Section 194.55, as amended by Chapter 22,079, Laws of Florida, Acts of 1943. As amended, the statute regulates the sale of tax delinquent lands by the county or the dedication of a part of such lands to public use.

Sections 199.02, 199.04, 199.07, 199.18, 199.24, 199.25, 199.30 and 199.31, or Chapter 22,867, Laws of Florida, Acts of 1945. These sections of the statutes relate to the taxation of intangible personal property. There were minor changes in most of the sections; however, Section 199.07 as amended permits the taxation of intangibles brought into the state after the first of January but prior to the first of April. It seems that they may be brought into the state either actually or constructively. Section 199.31 as amended authorizes refunds by the comptroller where there is an overpayment of taxes, where payments are made when no tax was due and pursuant to a court judgment under certain circumstances.

Section 200.02, or Chapter 22,758, Laws of Florida, Acts of 1945. This law relates to the time tangible personal property becomes a lien upon the property taxed. Under the statute prior to the 1945 amendment the lien attached when the taxes were due; under the amendment the lien attaches as of January first of the taxing year.

Section 205.16-1, or Chapter 22,664, Laws of Florida, Acts of 1945. This law granted to veterans of World War II the same exemptions from license taxes as those enjoyed by veterans of World War I and of the Spanish American War.

Sections 205.43 and 205.44, or Chapter 22,671, Laws of Florida, Acts of 1945. This law repealed existing Sections 205.43 and 205.44 and substituted in their place and stead a revised assessment of receipts taxes

on premiums and similar assessments or payments. There has been some litigation concerning this statute as revised and an appeal has reached the supreme court but has not yet been decided.

Section 205.44-1, or Chapter 22,749, Laws of Florida, Acts of 1945. This section is new and provides an optional or additional method of computing and paying the taxes mentioned in Sections 205.43 and 205.44. There has been some doubt among insurance lawyers as to the validity of this section when applied to nonresident insurers in comparison with local insurers. There has not yet been any decision of the supreme court on this question; however, the question is now before the supreme court for decision.

Section 205.45, or Chapter 22,737, Laws of Florida, Acts of 1945. This 1945 act amended the existing statute so as to extend the operation of the same and to include other and additional agents and solicitors.

Sections 210.01 to 210.18, or Chapter 22,645, Laws of Florida, Acts of 1945. This statute in effect makes permanent Chapter 21,946, Laws of Florida, Acts of 1943, which was temporary by its terms. The statute imposes an excise tax on cigarettes sold or offered for sale in this state and provides for the collection of such tax, by the State Beverage Department, and the distribution of the proceeds thereof.

Sections 211.01 to 211.21, or Chapter 22,784, Laws of Florida, Acts of 1945. This statute places a tax on the severance of oil and gas in this state and regulates the enforcement of such tax. This tax is new in this state. The validity of some provisions of this statute was upheld in the case of *Steele v. Freel*, 157 Fla. 223, 25 So. 2d. 501; however, the other provisions do not seem to have yet been litigated.

Sections 215.30 to 215.36, or Chapter 22,833, Laws of Florida, Acts of 1945. This is what is known as the Five Funds Act, which required that the accounts in the comptroller's office and state treasury be divided into five general groups, as provided in said statute.

Sections 216.02 et seq., or Chapter 22,857, Laws of Florida, Acts of 1945. This statute amended existing laws concerning the State Budget Commission and extended its powers and duties in connection with the fiscal management of the affairs of the state. See *State v. Lee*, Fla., 27 So. 2d. Adv. 84.

Sections 218.07 to 218.11, or Chapter 22,677, Laws of Florida, Acts of 1945. This statute authorizes the state, counties and municipalities to purchase surplus properties from the federal government.

Sections 231.34 et seq., or Chapter 22,839, Laws of Florida, Acts of 1945. This statute amended several of the existing statutory provisions concerning schools and the school code. The purpose of the statute appears to have been to remove some conflicts or other defects from the school code.

Sections 238.01 et seq., or Chapter 22,693, Laws of Florida, Acts of 1945. This statute amended several sections of the retirement system for teachers of this state, and redefined membership and benefit requirements.

Sections 239.37 to 239.44, or Chapter 22,944, Laws of Florida, Acts of 1945. This statute provides scholarships for the training of teachers in this state and provides for the distribution of the funds to teachers receiving the scholarships.

Section 241.05-1, or Chapter 22,596, Laws of Florida, Acts of 1945. This section permits the admission of spouses of war veterans to the institutions of learning in this state. Under this section, wives may be admitted to the University of Florida and husbands to the Florida State College for Women, when their spouses are students in such institutions.

Sections 241.09-1 to 241.09-5, or Chapter 22,994, Laws of Florida, Acts of 1945. This statute establishes a department of real estate in the University of Florida.

Section 241.46, or Chapter 22,773, Laws of Florida, Acts of 1945. This section relates to the entrance and graduation requirements of war veterans in the several colleges and universities in this state. It provides for the waiver of the last two semesters of preparatory college work where the student is a war veteran.

Sections 241.48 and 241.49, or Chapters 22,998 and 23,140, Laws of Florida, Acts of 1945. These sections established branch agricultural experiment stations and provided for their operation.

Sections 241.50 to 241.58, or Chapter 23,083, Laws of Florida, Acts of 1945. This statute establishes an institute of government as a part of the system of higher education in this state (§241.50). The law declares that it is the policy of the legislature that an institute of government is necessary to inform governmental officials, as well as citizens of the state, concerning questions of government and governmental finance. The purpose of the institute is to conduct studies upon various subjects of government and to conduct courses for the enlightenment of officers and employees of governmental units concerning their official duties and obligations (§241.51). The institute is to be located and established in quarters to be determined by the Board of Control and the trustees of the institute (§241.52). The affairs of the institute are under the direct supervision of a board of five trustees appointed by the governor (§241.53). An appropriation of fifteen thousand dollars is made for the purpose of conducting this institute (§241.59).

Sections 253.35-1 to 253.35-6, or Chapter 22,860, Laws of Florida, Acts of 1945. This statute provides for the homesteading of wild and vacant lands in this state by discharged veterans of World War II. This statute permits the homesteading of swamp and overflowed lands, internal improvement lands and tax forfeited lands. Although homesteading is authorized the availability of suitable lands may present a serious question.

Sections 253.51 to 253.61, or Chapter 22,824, Laws of Florida, Acts of 1945. This statute provides for the leasing of state lands for oil and gas purposes and regulates the method of entering into said leases by the state.

Sections 255.11-1 to 255.11-3, or Chapter 22,850, Laws of Florida, Acts of 1945. This statute relates to the Supreme Court Building Commission and authorizes the construction of a new court building, thereby extending the authority under a prior law.

Sections 282.01 to 282.22, or Chapter 22,827, Laws of Florida, Acts of 1945. This is the biennial appropriation for the biennial period between July 1, 1945 and June 30, 1947.

Sections 282.24 to 282.26, or Chapter 22,820, Laws of Florida, Acts of 1945. This statute provides an appropriation for postwar public building and creates a state building fund. Under this statute the Board of Commissioners of State Institutions is authorized to construct buildings and other equipment and institutions for governmental purposes. The validity of this statute was upheld in the case of *State v. Lee*, 157 Fla. 773, 27 So. 2d. 84, where the court held that the Board of Commissioners of State Institutions was not bound by the listing of buildings contained in Section 282.24, but was authorized under Section 282.25 to construct other and additional buildings and facilities than those named in Section 282.24.

Sections 286.09 to 286.22, or Chapter 22,558, Laws of Florida, Acts of 1945. This statute set up a Florida State Advertising Commission and authorized it to advertise the state and its industries and agricultural

and other products in newspapers, magazines, etc., within and without the State of Florida.

Sections 292.04 to 292.09, or Chapter 22,695, Laws of Florida, Acts of 1945. This statute set up a War Veterans' Service Commission and authorized it, through state service officers and their assistants, to render aid and assistance to war veterans without charge.

Sections 292.10 to 292.16, or Chapter 23,017, Laws of Florida, Acts of 1945. This statute authorized counties to establish county service officers for the purpose of assisting war veterans and cooperating with other agencies in connection with such assistance.

Sections 321.15 to 321.22, or Chapter 22,863, Laws of Florida, Acts of 1945. This statute set up a benefit plan for the Florida Highway Patrol, provides for its operation and the retirement of patrolmen thereunder. It also provides funeral expenses for patrolmen who die in line of duty. This statute was involved and upheld in the suit of *State v. Kirkman*, Fla., 27 So. 2d. 610.

Sections 332.01 to 332.12, or Chapter 22,846, Laws of Florida, Acts of 1945. This statute establishes uniform rules and regulations concerning the establishment of airports in this state and is known as the Airport Law of 1945.

Sections 333.01 to 333.14, or Chapter 23,079, Laws of Florida, Acts of 1945. This statute provides for zoning in and around airports so as to eliminate airport hazards in so far as reasonably possible. This statute is known as the Airport Zoning Law of 1945.

Section 341.73, or Chapter 23,078, Laws of Florida, Acts of 1945. This statute makes it the duty of the State Road Department to work toward the elimination of railway-highway crossing hazards and authorizes its cooperation with federal authorities under the Federal Highway Act of 1944.

Section 372.57, or Chapter 23,087, Laws of Florida, Acts of 1945. This statute provides for licenses and license fees in connection with fresh-water fishing and hunting for game and fur-bearing animals in this state.

Sections 374.14 and 374.15, or Chapter 22,786, Laws of Florida, Acts of 1945. This statute relates to the taking of shrimp and prawn and provides a closed season for the same and regulates fishing by nonresidents. See *Game and Fresh Water Fish Commission v. Williams*, Fla., 28 So. 2d. Adv. 431.

Sections 374.20 and 374.21, or Chapters 22,582 and 22,788, Laws of Florida, Acts of 1945. This statute relates to fishing in Lake Okeechobee and St. Johns river, which bodies of water have been declared by the legislature to be salt water. See *Game and Fresh Water Fish Commission v. Williams*, supra.

Sections 374.43 to 374.48, or Chapter 23,108, Laws of Florida, Acts of 1945. This statute authorizes the State of Florida to enter into a compact with the eastern seaboard states, known as the Atlantic States Marine Fisheries Compact and provides for the appointment of commissioners and defines their powers and duties in connection with such compact.

Section 375.20, or Chapter 23,132, Laws of Florida, Acts of 1945. This statute levies a severance tax on oysters and clams and provides for the distribution of the proceeds from said tax.

Sections 377.01 to 377.05, or Chapter 22,823, Laws of Florida, Acts of 1945. This statute provides for entering into an interstate compact to conserve oil and gas with the states of Texas, Oklahoma, California, New Mexico and such other states as may enter into such compact. The

powers and duties of state officials, in connection with this compact, are set out in the statute.

Sections 377.06 to 377.40, or Chapter 22,819, Laws of Florida, Acts of 1945. This statute provides for the conservation of oil and gas and places the control of oil and gas operations in the state under the State Board of Conservation. The board's authority is set out in several sections of the statute, which includes the power to make rules and regulations in connection with explorations for oil and gas. Permits are required from the board before exploration by drilling may be made.

Sections 383.08 to 383.13, or Chapter 22,644, Laws of Florida, Acts of 1945. This statute requires serological tests of pregnant women and places upon each midwife and physician the duty of causing such tests to be made.

Section 394.09, or Chapter 23,133, Laws of Florida, Acts of 1945. This section was revised and brought up to date. The prior law contemplated transportation by train and made no express provision for transportation by motor vehicle. The Florida State Hospital during recent years has maintained and operated its own means of transportation for transporting patients to the hospital; the revision was to expressly authorize this plan of transportation.

Sections 394.20 to 394.23, or Chapter 23,157, Laws of Florida, Acts of 1945. These sections relate to the adjudication of incompetents and the admission of the mentally incompetents to the Florida State Hospital. The 1945 act was intended to revise and bring these laws up to date and establish a modern procedure concerning incompetents. The revision was approved by a committee of the State Bar Association and by the bar association itself before being offered to the legislature for enactment. There have been no supreme court decisions involving these sections as amended, or any of them; however, I have been informed that the amendments have been upheld in some of the lower courts. See *In Re. Huss*, 157 Fla. 200, 25 So. 2d. 371; and *In Re. Cameron's Estate*, Fla., 28 So. 2d. Adv. 110.

Section 398.24, or Chapter 22,800, Laws of Florida, Acts of 1945. This statute authorizes the seizure and forfeiture of vehicles, boats and aircraft used in connection with the violation of the narcotic drug laws of this state.

Sections 409.16-1, 409.18-1, 409.31 and 409.32, or Chapters 22,552, 22,625, 22,815 and 22,816, Laws of Florida, Acts of 1945. These statutes provide additional appropriations to the State Welfare Board for old age assistance, dependent children, aid to the blind, etc.

Sections 409.27-1 and 409.27-2, or Chapter 22,681, Laws of Florida, Acts of 1945. This statute authorizes the placement of vending stands in public places to be operated by the needy blind of the state and regulates the operation of the same.

Sections 420.02 et seq., or Chapter 22,821, Laws of Florida, Acts of 1945. This statute amended the laws relating to the Florida State Improvement Commission and redefined and extended its powers and duties. See *State v. Caldwell*, 156 Fla. 618, 23 So. 2d. 855, 24 So. 2d. 797.

Sections 440.13, 440.15, 440.25 and 440.44, or Chapter 22,814, Laws of Florida, Acts of 1945. These laws amended previous sections relating to the Workmen's Compensation Law by providing for an increase in the benefits and compensation to injured employees. See *St. Johns River Shipbuilding Company v. Wells*, 156 Fla. 67, 22 So. 2d. 632; *Bituminous Casualty Corporation v. Braungart*, 157 Fla. 639, 26 So. 2d. 651; *Poster v. Lindsay*, 157 Fla. 788, 26 So. 2d. 806; *Porteus v. Miami Jockey Club*, Fla., 27 So. 2d. Adv. 674.

Sections 440.15-1 and 440.15-2, or Chapter 22,852, Laws of Florida, Acts of 1945. This statute defines occupational diseases and brings them within the purview of the Workmen's Compensation Law of this state.

Section 443.12, or Chapter 22,832, Laws of Florida, Acts of 1945. This law amended those statutes relating to the powers, duties and obligations of the industrial commission and extended the same.

Section 458.15, or Chapter 23,005, Laws of Florida, Acts of 1945. This statute amended the criminal provisions of the laws relating to the regulation of physicians. See *Sweat v. Pettis*, Fla., 27 So. 2d. Adv. 827.

Sections 470.01 et seq., or Chapter 22,617, Laws of Florida, Acts of 1945. This statute amended several of the sections relating to funeral directors and embalmers.

Sections 475.29, 475.31, 475.43 and 475.44, or Chapter 22,861, Laws of Florida, Acts of 1945. This statute amended existing laws concerning the Real Estate Commission in this state and related principally to its jurisdiction to investigate violations and to make orders in connection therewith.

Sections 485.03 and 485.04, or Chapters 22,914 and 23,016, Laws of Florida, Acts of 1945. This statute authorizes the readmission of war veterans into any of the professions regulated by law in this state without examination where an examination would otherwise be required because of failure to renew their licenses, where such renewal was not possible by reason of their service in the armed forces.

Section 500.15, or Chapter 22,927, Laws of Florida, Acts of 1945. This statute relates to misbranding of drugs and defines what is to be construed as misbranding.

Sections 531.16 to 531.33, or Chapter 22,536, Laws of Florida, Acts of 1945. This statute adopts the weights and measures approved by Congress of the United States as weights and measures in this state and provides for the enforcement of such weights and measures. The enforcement of this law is placed under a commissioner.

Section 531.34, or Chapter 22,765, Laws of Florida, Acts of 1945. This statute establishes a standard measure for wheat flour.

Sections 534.01 to 534.20, or Chapter 22,856, Laws of Florida, Acts of 1945. This statute establishes standards for marks and brands for cattle in this state and provides for the enforcement of the same.

Sections 550.04, 550.10 and 550.26, or Chapters 22,588, 22,599 and 22,858, Laws of Florida, Acts of 1945. These statutes relate to racing meets and to licenses and distribution of license taxes in connection with horse and dog racing.

Section 550.30, or Chapter 22,896, Laws of Florida, Acts of 1945. This statute guarantees, from the state general revenue fund, that counties will receive not less than thirty-three thousand dollars from racing taxes.

Sections 551.09 and 551.12 to 551.14, or Chapters 22,614 and 22,817, Laws of Florida, Acts of 1945. These statutes relate to pari-mutuel pools and wagering in connection with frontons and to taxation of such racing and the distribution of the proceeds thereof.

Sections 561.01 et seq., or Chapter 22,663, Laws of Florida, Acts of 1945. This statute amended several sections of the beverage act. See *Nelson v. State*, 157 Fla. 412, 26 So. 2d. 60; *Mechlow v. Vocelle*,

156 Fla. 115, 22 So. 2d. 631; City of Miami v. State, Fla. 27 So. 2d. Adv. 829; State v. Vocelle, Fla. 27 So. 2d Adv. 728.

Section 561.46, or Chapter 22,562, Laws of Florida, Acts of 1945. This statute levies an excise tax on alcoholic and intoxicating beverages.

Section 561.64, or Chapter 22,713, Laws of Florida, Acts of 1945. This section levies an additional tax upon alcoholic beverages containing fourteen per cent or more of alcohol. This statute expires June 30, 1947.

Sections 562.13 et seq., or Chapter 22,669, Laws of Florida, Acts of 1945. This statute amended several sections of the enforcement provisions of the beverage law. See Johnson v. State, Fla. 28 So. 2d. Adv. 104.

Section 562.50, or Chapter 22,633, Laws of Florida, Acts of 1945. This statute prohibits the furnishing of intoxicating liquors to habitual drunkards after notice.

Sections 578.01-1 et seq., or Chapter 22,694, Laws of Florida, Acts of 1945. This statute amended several sections of the Florida Seed Law.

Sections 585.10, 585.11, 585.32, 585.32-1, 585.34 and 585.44, or Chapters 22,517, 22,581, 22,592, 22,886 and 23,080, Laws of Florida, Acts of 1945. These statutes amended several sections of the statutes relating to the State Live Stock Sanitary Board. They permit closer cooperation between the state and United States authorities; provide for the purchase and distribution of anti-hog cholera serum and hog cholera virus; inspection and transportation of meats in this state and to the purchase and distribution of Bang's disease vaccine.

Sections 595.01 et seq., or Chapters 22,519, 22,520, 22,522, 22,523, 22,524, 22,525, 22,526, 22,527, 22,529, 22,530, 22,531, 22,532, 22,533, 22,534, 22,535, 22,550 and 22,593, Laws of Florida, Acts of 1945. These statutes amended existing laws concerning citrus fruit and the Florida Citrus Commission and its powers and duties in connection with citrus fruit.

Sections 617.16 to 617.20, or Chapter 22,657, Laws of Florida, Acts of 1945. These sections provide when corporations for profit may become corporations not for profit and the procedure to accomplish such transition.

Sections 629.01 to 629.24, or Chapter 22,621, Laws of Florida, Acts of 1945. This statute provides for the regulation of rates for fire and other insurers in this state. Such regulations are placed under the supervision of the insurance commissioner.

Sections 630.01 to 630.12, or Chapter 22,637, Laws of Florida, Acts of 1945. This statute provides for the regulation of rates for casualty insurance and fidelity, guaranty and surety bonds. Such regulation is placed under the supervision of the insurance commissioner.

Sections 632.07 and 632.08, or Chapters 22,858, 22,619 and 23,139, Laws of Florida, Acts of 1945. These sections relate to domestic mutual fire insurance associations and prohibit any transaction of business by them until license is granted. The risks authorized to be assumed by such associations are set out in the statute.

Sections 635.17-1 to 635.17-3, or Chapter 22,880, Laws of Florida, Acts of 1945. This statute requires insurers to submit their insurance forms to the insurance commissioner for approval before use.

Section 635.22, or Chapter 22,555, Laws of Florida, Acts of 1945. This section prohibits the writing of life insurance, the payment of which is contingent upon the collection of assessments. Fraternal benefit societies appear to be exempted from the operation of this law.

Sections 641.01 to 641.16, or Chapter 22,826, Laws of Florida, Acts of 1945. This statute provides for the incorporation and operation of medical, surgical and hospital service plans in this state under the direction of the insurance commissioner.

Section 653.16, or Chapter 22,849, Laws of Florida, Acts of 1945. This section regulates the payment of deposits made in more than one name.

Section 653.17-1, or Chapter 22,591, Laws of Florida, Acts of 1945. This section regulates the payment of deposits made in banks and trust companies in the names of minors.

Sections 695.21 to 695.23, or Chapter 23,114, Laws of Florida, Acts of 1945. This statute requires that instruments other than mortgages conveying or purporting to convey real estate or any interest therein contain the post-office address of grantees as a condition precedent to recording the same.

Sections 731.01 to 734.40 and 736.01 to 736.05, or Chapter 22,783, Laws of Florida, Acts of 1945. This statute was a revision of existing statutes without any material change in substance. However, Sections 731.34, 732.16, 732.17, 732.19, 732.24, 732.45, 732.47, 733.04, 733.23, 733.26, 733.28, 733.43 and 74.29 were amended by Chapter 22,847, Laws of Florida, Acts of 1945, which was a general revision by the State Bar Association of said sections, some of which amendments were material changes in the existing statutes.

Sections 732.05 and 732.15, or Chapter 22,767, Laws of Florida, Acts of 1945. These sections were amended by the above chapter so that the cause is in legal effect removed to the circuit court when the county judge is disqualified and the circuit judge acts. Appeals from orders of the circuit judge acting where a county judge is disqualified lie to the supreme court and not to the circuit court under this amendment. This amendment changed the rule adopted by the Florida Probate Law and made it the same as before the adoption of that law. See *In Re. Starr's Estate*, 125 Fla. 536, 170 So. 620, upholding a similar law in force prior to the adoption of the Florida Probate Law.

Sections 735.01 to 735.13, or Section 15, Chapter 22,847, Laws of Florida, Acts of 1945. This law amended the existing statutes providing when administrations on estates of decedents are unnecessary in this state and the court proceedings in connection therewith. There was no material change in this statute by the amendment, except as to the amount of the estates which come within the statutes. The main purpose of the statute was to clear up some defects in the prior law. The amendment also provided a streamlined administration proceeding for small estates (Sections 735.01 to 735.03). This revision was prepared and approved by the State Bar Association and submitted to the 1945 legislature, which adopted it. Although involving a prior statute, see *Coral Gables First National Bank v. Colee*, 155 Fla. 498, 20 So. 2d. 675 and *Coral Gables First National Bank v. Hart*, 155 Fla. 482, 20 So. 2d. 647.

Section 736.06, or Chapter 22,884, Laws of Florida, Acts of 1945. This statute provides for the admission to record of duly authenticated copies of probate proceedings had in other states, and the effect of such copies in this state from and after three years from the death of the decedent in question. After said three years, the said copies are made evidence of title to real estate where there has been no administration in this state upon the estate of the decedent in question.

Section 741.04, or Chapter 22,643, Laws of Florida, Acts of 1945. This statute amended the laws relating to the issuance of marriage licenses and required the publication of a three-day notice prior to the issuance of same. See *Blanton v. State*, 156 Fla. 694, 24 So. 2d. 232; *Eckersley v. Eckersley*, 157 Fla. 722, 26 So. 2d. 811.

Sections 741.05-1 to 741.05-12, or Chapter 22,738, Laws of Florida, Acts of 1945. This statute requires a serological test as a condition precedent to the issuance of a marriage license and regulates the making of said tests and the preservation of the reports in connection therewith filed with the county judge.

Sections 744.01 to 746.17, or Chapter 22,750, Laws of Florida, Acts of 1945. This statute was a general revision and extension of the existing guardianship laws of this state, prepared by the State Bar Association and submitted to the 1945 legislature, which enacted the same as prepared by the bar association. The revision extended the existing laws on guardianship and brought them up to date. The revision seems to be complete and in detail and a great improvement over the statutes prior to such revision and amendment. See *In Re. Cameron's Estate*, Fla., 28 So. 2d. Adv. 110.

Sections 747.01 to 747.04, or Chapter 22,888 Laws of Florida, Acts of 1945. This statute provides for conservation of the property of persons missing in action, captured or otherwise unaccounted for during service with the armed forces in wartime. The purpose of this statute appears to be the protection of the property of members of the armed forces when prisoners of war or otherwise out of touch with their home country.

Sections 771.01 to 771.08, or Chapter 23,138, Laws of Florida, Acts of 1945. This statute abolishes actions for alienation of affections, criminal conversation, seduction and breach of promise in this state but preserves such rights of action as existed at the time of the enactment of the statute; however, it placed a sixty-day limitation upon the right to bring such actions. See *Goldstein v. Young*, 156 Fla. 502, 23 So. 2d. 730.

Section 817.36, or Chapter 22,726, Laws of Florida, Acts of 1945. This statute prohibits resale of tickets of common carriers, places of amusement, etc., at a price in excess of one dollar above the price therefor by the original seller. This section exempts travel agencies in this state having an established place of business.

Section 836.11, or Chapter 22,744, Laws of Florida, Acts of 1945. This statute prohibits the publication of any material which tends to expose persons to hatred, contempt or ridicule unless the person publishing the same show his true name and post-office address in said publication. It relates to almost any kind of publication, whether by newspaper or otherwise.

Section 839.22, or Chapter 22,761, Laws of Florida, Acts of 1945. This statute prohibits the commission of unlawful acts under color of office and makes such violations a crime. The law relates to officers of the United States and of the State of Florida.

Section 918.10, or Chapter 22,775, Laws of Florida, Acts of 1945. This statute relates to charges by judges in trial of criminal matters. It amended the existing law by requiring that the judge include in his charge the penalty fixed by law for the offense of which the accused is on trial.

Section 952.23, or Chapter 22,742, Laws of Florida, Acts of 1945. This statute authorizes the Board of Commissioners of State Institutions to use state convicts at certain state institutions and agencies under the operation and management of such board.

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IMPORTANT COURT PROCEEDINGS AND DECISIONS

During the years 1945 and 1946 there were several important court proceedings and decisions, most of which relate to or arise out of the above constitutional amendments and legislative enactments, of sufficient importance to justify their inclusion in this report. These court proceedings and decisions will be classified according to general subject matter and points of law involved.

Right-to-work amendment and labor laws.—

American Federation of Labor v. Watson cases.—The opinions of the three-judge federal district court (*American Federation of Labor v. Watson*, DC Fla., 60 Fed. Supp. 1010) and of the Supreme Court of the United States (*American Federation of Labor v. Watson*, 327 U. S. 582, 66 S. Ct. 761, 90 L. Ed. Adv. 715) involving the operation and validity of section twelve of the state declaration of rights, sometimes referred to as the right-to-work amendment, are fully discussed under the title "1944 Constitutional Amendments" of this part of this report, to which reference is made.

Frazier v. Coleman, 156 Fla. 413, 23 So. 2d. 477.—In this case the appellant Frazier, together with certain other bus drivers in Miami, Florida, were informed against, by the county solicitor, for participating in a "strike, walkout and cessation of work and continuation thereof without the same being authorized by a majority vote of the employees to be governed thereby" in violation of section 481.09 of the Cumulative Supplement to Florida Statutes, 1941. In habeas corpus proceedings in the circuit court the appellant was remanded, from which order or remand he appealed. The judgment of remand was affirmed by the supreme court which refused to directly pass upon the constitutionality of a statute, even when directly challenged as was done in the case, when the cause in which the challenge arises may be fully determined upon other meritorious grounds.

Hill v. Watson cases.—Section 481.04 of the Cumulative Supplement to Florida Statutes, 1941, requires the procurement of a license or permit, as in said section provided, as a condition to acting as a business agent of a labor organization in this state. Business agents are defined in section 481.02 of said statute. Section 481.06 requires the filing of an annual report by labor organizations operating in this state. Sections 481.04 and 481.06 were subject to court construction in a proceeding brought by one Hill against the attorney general of Florida and others in the circuit court of Duval county, which court upheld the validity of the law in question. The case was appealed to the supreme court of this state (*Hill v. Watson*, 155 Fla. 245, 19 So. 2d. 857) where the decree of the lower court was affirmed. The decision of the supreme court of this state was reviewed by the Supreme Court of the United States (*Hill v. Watson*, 325 U. S. 538, 65 S. Ct. 1373, 89 L. Ed. 1782) on certiorari and reversed in part and affirmed in part. It was reversed only in so far as it may conflict with the National Labor Relations Act and affirmed in all other respects. A final decree was entered by the circuit court of Duval county, pursuant to the mandate of the appellate courts in the case, on February 1, 1946. The effect of the decisions of the courts was (1) to delete the following language from section 481.04, to wit, "and are of the opinion that the public interest requires that a license or permit should be issued to such ap-

plicant"; (2) to hold said sections 481.04 and 481.06 valid and enforceable so as to require the filing of reports and that business agents obtain a license or permit before they engage in activities as such business agent in this state, except any person may engage solely in the activities of a collective bargaining representative under the National Labor Relations Act without such a license so long as he does not engage in activities not covered by such National Labor Act; (3) to hold that labor organizations may not be enjoined, upon failure to comply with section 481.06, from functioning solely with respect to collective bargaining activities under and as contemplated by the said National Labor Act, but as to all other activities the provisions of the statute are valid and enforceable by injunction or other proper legal means. In view of the recognized purposes, functions and activities of labor organizations in this state, all such organizations must comply with the state statutes except as otherwise provided by the National Labor Act.

Miami Water Works Local No. 654 v. City of Miami, —Fla.—, 26 So. 2d. 194.—Miami Water Works Local No. 654, a labor union affiliated with the American Federation of Labor, instituted suit in the circuit court for Dade county for a declaration of its rights as a labor union in its relationship with the City of Miami. The said local alleged that it was the proper bargaining agent for the employees of the city waterworks, to bargain collectively with the city concerning its employees at the waterworks but that the city and its officials refused to so bargain with them. The circuit court granted the city's motion to dismiss the proceeding for declaration and the union appealed the cause to the supreme court of the state. The right of the union to bargain collectively with the city was based upon chapter 481 of the Cumulative Supplement to Florida Statutes, 1941, and upon section 12 of the declaration of rights of the state constitution. The supreme court observed that the said constitutional amendment "does not give the right of collective bargaining to any group." The supreme court affirmed the dismissal of the suit by the circuit court. The effect of the decision in this case was to hold that the city is not required under the law to recognize the union in question.

Nation v. State, 155 Fla. 219, 22 So. 2d. 219.—Although this case does not involve the right-to-work amendment or chapter 481 of the statute, it does involve the transportation of labor from this state. Section 205.59, Florida Statutes, 1941, as amended, requires that all persons who come into this state to procure labor for employment beyond the borders of this state must obtain a license. In the above case the appellant came into this state and solicited labor in this state to be transported to other states for employment there without obtaining a license as required by said section 205.59 and was convicted of violating such statute, by the criminal court of record for Orange county. On appeal to the circuit court this conviction was affirmed. The supreme court refused to quash the affirmance of the circuit court on certiorari to that court.

School statutes and laws.—

There have been several important court decisions and opinions construing or applying school statutes or laws of this state. Of these decisions and opinions the following appear to be the most important:

Fowler v. Turner, Fla., 26 So. 2d. 792.—In this case the court construed a local act only applicable to Dade county which provided for the consolidation of all the tax school districts in Dade county into a single district. The supreme court first held the enactment to be invalid but on rehearing set aside its said ruling and upheld the act. This act provided that the consolidated district, that is, the entire county, "shall be primarily liable for all of the bonds and other

obligations of the several districts so consolidated and subject to be taxed for the payment thereof." The court held that if these words are to be construed literally, the act would be unconstitutional. It then resorted to that rule of statutory construction to the effect that if there is any reasonable theory upon which a statute can be upheld it is the duty of the courts to adopt that theory in favor of its validity, and then held the quoted words to mean that the new consolidated district would only administer the financial affairs of the former districts and leaving the former districts severally liable for their respective bonds. The court also held that it is not necessary under the constitution for a county to be divided into more than one tax school district. Also, noteworthy, was the holding that the area affected in the referendum provided for in the act was the entire county and not the several tax school districts.

Board of Public Instruction v. Britt,.....**Fla.**....., 26 So. 2d. 902.—This case was decided shortly after the case of *Fowler v. Turner*, above discussed, and upheld the principals enumerated in the *Fowler v. Turner* case and held them applicable to the organization of more adequate school districts under section 236.59, Florida Statutes, 1941. These decisions will undoubtedly speed the recent tendency toward consolidation of tax school districts.

Wear v. Faulkner,.....**Fla.**....., 27 So. 2d. 745.—In this case the board of public instruction for Polk county was proceeding under section 236.59, Florida Statutes, 1941, which provides for organization of more adequate special tax school districts in this state. The plan of organization of such districts in Polk county under said statute involved the consolidation of districts and parts of districts. The plan was approved in some of the existing districts and disapproved in others. The opinion of the court in this case clarified the question of the effect of favorable elections in some districts and unfavorable ones in other districts. The court held that where the vote was unfavorable in an old district or part of a district that such old district or part of district remained as before the election and that the statute did not require that all of the voting areas, that is, all of the newly proposed districts in the county, approve the plan.

Satan Fraternity v. Board of Public Instruction,.....**Fla.**....., 22 So. 2d. 892.—This case upheld the constitutionality and validity of the 1943 act, now sections 242.46, 242.47 and 242.48 of the Cumulative Supplement, Florida Statutes, 1941, prohibiting the organization and operation of secret societies, fraternities or sororities in the public free schools of this state.

Taylor v. Board of Public Instruction,.....**Fla.**....., 26 So. 2d. 180.—In this case the supreme court, construing section 227.13, Florida Statutes, 1941, held that county boards of public instruction have authority to borrow money for the acquisition or construction of homes for teachers employed by them.

Reynolds v. Board of Public Instruction, CCA 5th, 148 Fed. 2d. 754.—Although this case was decided by the United States Circuit Court of Appeals just prior to the present biennium, it seems to be of sufficient importance for inclusion in this report. Reynolds, a colored teacher in Dade county, brought a class suit, in behalf of himself and all others having similar rights, for a declaratory decree and an injunction against the board of public instruction for Dade county to adjudicate the rights of the plaintiff against an alleged policy of the defendant school board in paying white teachers higher salaries than colored teachers. Prior to the institution of this suit the teachers of the county had been divided into white and colored classes and there may have been discrimination in salaries; however, upon complaint of the colored teachers and study of the matter by the board also prior to the bringing of

the suit, the former division of teachers into white and colored classes was discontinued and a rating system of teachers installed by the board. Under the system so established a rating of each teacher, white and colored, was made by a rating committee composed of five professional instructors, including the county superintendent. Under this rating system tests to both white and colored teachers were given in the same room and at the same time. The installation of the new system resulted in many salary changes of individual teachers, both white and colored. Both the district court and the circuit court of appeals found that the operation of the rating system was fair and just and without discrimination, and upheld that method of fixing salaries, and the fixing of salaries by such classification as not being in violation of the state or federal constitution. A similar ruling was made by Judge Barker in 1943. In that case ratings were based upon (1) physical health, personality and character, (2) scholarship and attitude, (3) instructional skill and performance, (4) years of college attended and (5) years of teaching experience.

Burdeshaw v. Vassar, 156 Fla. 781, 24 So. 2d. 364.—In this case the court upheld the right of the board of public instruction to establish attendance areas in the county and to provide for transportation to and attendance of children, residing within those attendance areas, at designated schools.

Wicker v. Board of Public Instruction, 156 Fla. 7, 22 So. 2d. 255.—In this case a board of public instruction had purchased certain real property and gave its promissory note for the purchase price thereof. This promissory note was negotiated and suit was brought, by an endorsee thereof, upon the original obligation for which the note was given but not upon the note itself. The circuit court sustained a demurrer to the declaration in the case but on appeal to the supreme court this judgment was reversed. The supreme court held that, notwithstanding the invalidity of the note, the board was estopped to deny liability for the purchase price of the property. The court said that the declaration did not entirely fail to state a cause of action.

Board of Public Instruction v. State, 156 Fla. 719, 24 So. 2d. 105.—In this case school bonds had been voted; however, after the election it was discovered that the resolution for their issuance provided that two of the installments be made in a sum less than three per cent of the total principal of the issues, in violation of section 17, article XII, of the state constitution. The board petitioned the court for leave to correct the error, which petition was denied by the circuit court. The supreme court held that the petition should have been granted and the board permitted to make the correction, because it appeared to be a mere oversight and no person had complained and no person would be injured.

Taxation; interest of purchasers when title in federal government.—

Bancroft Investment Corporation v. City of Jacksonville, Fla., 27 So. 2d. Adv. 162.—During the year 1940 the United States sold and agreed to convey the old post-office building and premises in Jacksonville to the Hogan and Adams Corporation, deed to be made after full payment of the contract price, which was payable one-fifth in cash and the balance in five equal annual installments. Under the contract, title to the property was to remain in the United States until payment of the contract price in full; however, possession was immediately given to the purchaser. Subsequent to the making of this contract the Hogan and Adams Corporation assigned and set over their interests and possession to the Bancroft Investment Corporation, who constructed a large store building on the premises. For 1941 and subsequent years the City of Jacksonville assessed a general real estate ad valorem tax against the said property as property of the Bancroft Investment Corporation; subject, however, to the rights and interests of the United States. Suit was brought by the investment corporation for cancellation of this assessment. The tax was upheld in the circuit court, but on appeal to

the supreme court the circuit court was first reversed and the tax held invalid, on the ground that the legal title to the property belonging to the United States; however, on rehearing the decree of the circuit court was upheld. After the reversal of the case by the supreme court as aforesaid, application was made for a rehearing, the attorney general having joined in such application for rehearing and requested leave to appear in the cause as *amicus curiae*. Rehearing was granted and the attorney general was permitted to file a brief in the cause on rehearing. Soon after the application for rehearing was made, the Supreme Court of the United States decided the case of *S. A. R. Inc. v. Minnesota*, 326 U. S. _____, 66 S. Ct. _____, 90 L. Ed. _____, thereby permitting the taxation of a similar property in Minnesota. After this decision and on rehearing, the supreme court of this state receded from its opinion of reversal and affirmed the decree of the circuit court, thereby holding that the interest of the purchaser was subject to taxation in this state. Under the above decisions of the Supreme Court of the United States and of this state, real estate purchased from the United States on the installment plan is subject to taxation in this state unless there is some positive statute prohibiting its taxation, such as was the case of homesteads entered under a prior federal law.

Taxation; priority between general taxes and drainage assessments.—

Drainage cases.—In several cases (*Trustees Internal Improvement Fund v. Southwest Tampa Storm Sewer Drainage District*, 142 Fed. 2d. 637; *Baldwin Drainage District v. MacClenny Turpentine Company*, 154 Fla. 525, 18 So. 2d. 792; *State v. Everglades Drainage District*, 155 Fla. 403, 20 So. 2d. 397; *State v. Broward Drainage District*, 155 Fla. 407, 20 So. 2d. 399; *State v. Lake Worth Drainage District*, 155 Fla. 408, 20 So. 2d. 399) it has been held that under the statute in this state making the lien of drainage district taxes equal and on a parity with state and county taxes, under tax forfeiture laws such as the Murphy act, and where tax deeds are issued, the drainage lien becomes superior to the title of the state under tax forfeiture laws or the title to the grantee under a tax deed. In the *Tampa Storm Sewer Drainage District* case, the federal courts held, upon authority of decisions of the supreme court of this state, that drainage taxes were to be paid in full before the state received any compensation for its lands held under the Murphy act. The legal effect of these decisions is to make the state's title to its property subordinate and inferior to the claims of the drainage districts upon the same lands. A bill was offered in the 1945 session of the legislature for the purpose of correcting this defect in the laws and giving the state an equal claim to that of the drainage district in connection with its Murphy act lands and similar titles; however, the bill failed to pass the legislature.

Taxation; powers of county commissioners in equalizing.—

Orange County v. Braden.—This case was in the circuit court of Orange county and raised the issue as to whether or not a board of county commissioners may make a general revision of the assessments made by the tax assessor. The issues get down practically to the question as to whether or not the tax assessor or the board of county commissioners, sitting as a board of equalization, is the ultimate tax assessor of the county. In this case the board of county commissioners of Orange county attempted to make a blanket reduction of the taxes assessed on 92 pieces of property on both sides of Orange Avenue, which pieces of property constituted one body of land. The county commissioners reduced the assessment made by the tax assessor without having any definite objection thereto from the owners of these lands. The circuit court held that the county commissioners were without authority to make a reassessment of the property; that their powers were confined to correcting apparent errors made by the tax assessor. Although notice of appeal to the supreme court was filed in this case, the same has not been perfected and I am now advised that Orange county has abandoned its appeal.

Taxation; excise tax on note payable in another state.—

Plymouth Citrus Growers Association v. Lee,..... Fla., 27 So. 2d. Adv. 415.—In this case a promissory note was executed in this state but mailed to the Columbia Bank for Cooperatives of Columbia, South Carolina, and was made payable at such bank. The note was in the principal sum of \$750,000.00. The comptroller levied a documentary stamp tax against the makers of the note for \$750.00. The makers of the note contended that it was not subject to taxation under the laws of Florida because the transaction was not completed in this state. The lower court and the supreme court held that the note was subject to taxation under the laws of this state as it was within the purview of the Florida statute, it having been made or executed in this state. The court also held the mere fact that it was made payable to an instrumentality of the United States was not sufficient to exempt it from taxation as the tax was against the maker and not the payee of the note.

Taxation; exemption of labor union halls.—

Johnson v. Sparkman.—This suit was in the circuit court of Hillsborough county and sought to exempt from taxation a lodge hall owned and occupied by a labor union. The labor union contended that the lodge hall was exempt from taxation because it was in effect a fraternal, charitable or educational institution. The court held that the bill of complaint as amended failed to show that such lodge hall was used for such purposes and denied the writ of injunction sought for the purpose of prohibiting the tax assessor from assessing and the tax collector from collecting a tax on the said lodge hall.

Taxation; excise tax on long-term lease.—

Dundee Corporation v. Lee, 156 Fla. 699, 24 So. 2d. 234.—In this case the supreme court held that a ninety-nine year lease of real property was a "written obligation to pay money" and therefore subject to our excise tax on documents or chapter 201, Florida Statutes, 1941. It was held that such stamp tax should be computed on the present value of the lease, taking into consideration the present rate of interest on money and the speculative and contingent attributes of such leases. In its opinion the court sets out a formula for calculating the present value of such leases.

Freedom of the press.—

Pennekamp cases.—John D. Pennekamp was the associate editor of the Miami Herald, a newspaper of general circulation published in Miami, Florida. On November 2, 1944, there was published in the newspaper an editorial and cartoon which seems to have involved the subject of courts, and on November 7, 1944, there was published another editorial involving the same subject. These editorials and cartoon seemed to reflect on or concern one of the circuit judges in Dade county. After the publication of the editorial and cartoon on November 2, 1944, the circuit judge who considered himself reflected on by the said editorial and cartoon, or whom they may have concerned, issued a citation to the said associate editor and the corporation publishing the newspaper to show cause why they were not in contempt of court by said publication. Upon hearing the court adjudged them to be in contempt of court. An appeal was taken from this adjudication to the supreme court of this state (*Pennekamp v. State*, 156 Fla. 227, 22 So. 2d. 875) which court affirmed the same. On appeal to the Supreme Court of the United States (*Pennekamp v. Florida*, 326 U. S. 709, 66 S. Ct. 1029, 90 L. Ed. 1001) the judgments of the state supreme court and circuit court were reversed, the court holding that the publication was within the constitutional right of freedom of the press, that the alleged contemptuous matter did not present a clear and present danger of high eminence to the administration of justice in the Dade county circuit court.

Elections and election laws.—

Davis, Supervisor of Registration v. State ex rel., Cromwell, 156 Fla. 181, 23 So. 2d. 85.—This case involved the right of a negro person to register as a democratic elector on the registration books of Escambia county. The relator was otherwise a qualified elector under the laws of Florida and offered to comply with all of the requirements of section 102.21, Florida Statutes, 1941, governing the registration of electors, and requested that he be registered by the respondent as an elector affiliated with the democratic party on the registration books of such county, despite the fact that the State Democratic Executive Committee had resolved that proper members of said party shall be "White Persons." The case originated in the circuit court of Escambia county when the respondent declined to permit the relator to register as a democrat because he was a negro. The supreme court upheld the contention of the relator and ordered the respondent to permit the relator to register as a democrat on the strength of the decision of the Supreme Court of the United States in *Smith v. Allwright*, 321 U. S. 649, 64 S. Ct. 757, 88 L. Ed. 1594.

Davis, Supervisor of Registration v. State ex rel., Chavis, 156 Fla. 178, 23 So. 2d. 87.—Like the *Cromwell* case, this case was appealed to the Supreme Court of Florida from the circuit court of Escambia county. In the *Chavis* case the relator, a negro, was already registered on the registration book of such county as a republican elector and sought to have his party affiliation changed to the democratic party, by virtue of section 102.11, Florida Statutes, 1941, providing a method for persons to register such a change. The respondent refused to make the change because the relator was a negro. The supreme court ruled with the relator and ordered the respondent to effect the change, the decision on this point having been founded on *Smith v. Allwright*, *supra*.

State ex rel., Black v. Gray.—Chapter 23614, Laws of Florida, Acts of 1945 (section 10.01, 1945 Cumulative Supplement to Florida Statutes, 1941), reapportioned the state into senatorial districts, such reapportionment purported to have been made pursuant to section 3, article VII, of the state constitution. Senator Graham Black, former senator of the old thirtieth district, contending that the reapportionment was unconstitutional and void petitioned the supreme court for a writ of mandamus against the secretary of state requiring him to give election notices and to provide for the election of state senators at the 1946 election as if no reapportionment had been made as aforesaid. It was alleged in the said petition that said chapter 23614 was not enacted in compliance with the above section of the constitution. The court dismissed the petition without opinion.

Horrell v. Gray, et al.—While no 1945 legislation was involved in the case of *James G. Horrell v. Gray, et al.*, as members of the state canvassing board, lately pending in the circuit court for Leon county, it seems to be worthy of comment here. In the 1946 primaries in Orange county, James G. Horrell and Tyn Cobb, Jr., were the democratic nominees for members of the house of representatives of this state, running in democratic groups one and two respectively. There were also two republican nominees for the same offices, running in republican groups one and two respectively. At the 1946 general election in Orange county the democratic nominees and the republican nominees were arranged in two party columns, democrats and republicans, as required by statute, with instructions to vote for two. At the election Cobb, one of the democrats, received the highest number of votes, Akerman, one of the republicans, the next highest, Horrell, one of the democrats, the next highest, and Chubb, one of the republicans, the lowest. The above suit was instituted by the plaintiff for a declaratory decree and injunctive relief, the bill seeking to have the court declare whether or not the general election was by groups as in the primaries, with Cobb and Akerman running in one group and Horrell and Chubb in the other group, and to cause the state

canvassing board to certify the election in accordance with the declaration of the court. The court, holding that only the house of representatives have jurisdiction to judge the qualifications, elections and returns of its members, dismissed the bill of complaint.

Extradition; presence in demanding state.—

Ennist v. Baden,..... Fla....., 28 So. 2d. Adv. 160.—The court upheld the validity of section 941.06, Florida Statutes, 1941, and held it to be a valid exercise of legislative power. This section of the statute provides for the extradition of persons who were not present in the demanding state at the time of the commission of the crime charged. This section is a part of the uniform criminal extradition law which was enacted by Florida in 1941. Research reveals that this case is one of only four cases in the appellate courts of the several states where this particular question and section have been considered. In its opinion the court sets forth the necessary requisites for an indictment, information or affidavit to support extradition by virtue of this section, as follows: "We think that it is essential that the indictment, information or affidavit under which extradition is sought to be issued in the purview of this state statute must allege that at the time the alleged crime was committed the accused was then either in this state or that he was then in a third state (named in the charging document) and in the state named committed an act intentionally resulting in a crime in the state whose executive authority is making the demand, or must contain a showing that the accused was in the demanding state at the time the crime was committed, and that otherwise the extradition warrant cannot lawfully issue."

Conservation laws.—

Caldwell v. Mann,..... Fla....., 26 So. 2d. 788.—Section 374.23, Florida Statutes, 1941, prohibits the taking, possession, buying, selling or offering for sale or shipping of any fresh or freshly salted mullet or mullet roe between December 1 of any year and January 20 of the next succeeding year, and had its origin as section 2, chapter 10123, laws of Florida, acts of 1924. When originally enacted, this statute was applicable to the whole of Florida but by virtue of subsequent acts of the legislature, thirty counties have been eliminated from its operation in so far as the same relates to the possession, buying, selling or offering for sale or shipping. This case was instituted in the circuit court of Leon county to restrain the state board of conservation and the supervisor of conservation from enforcing the last mentioned provisions of the statute on the ground that such provisions were violative of the equal protection clause of the Declaration of Rights of our state constitution, in that the plaintiffs, who were doing business in counties where said provisions were operative, were unable to possess and sell mullet during the closed season while others engaged in the same business but situated in counties that had been removed from the operation of the statute were permitted to possess and sell mullet during the closed season. Three of the plaintiffs were doing business in inland counties not bordering upon water inhabited by mullet, while the remainder of the plaintiffs were doing business in counties bordering upon the Gulf of Mexico and counties in which this class of fish is protected during the closed season. Upon appeal, the supreme court held that the enforcement of the statute in those counties within its operation and which border on salt water and therefore have within their boundaries fish which it is the purpose of the statute to protect, is not contrary to the constitutional rights of a person engaged in the business of selling fish in those counties. This holding was based upon the theory that the inhibition against the possession and sale of mullet during the closed season is incidental to the principal purpose of the statute, namely, the protection of the salt-water fish industry in those counties and is the means by which that objective is accomplished. The court further held, however, that by eliminating inland counties from the operation of the statute, the legislature destroyed

the equal protection of the law in so far as the statute applies to non-coastal counties and that there being no valid basis for a classification prohibiting the possession and sale of mullet in the non-coastal counties to which the statute is still applicable, the statute is invalid and may not be enforced in the latter counties without an unlawful discrimination. It seems that this case points up the urgency and necessity for legislation on a state-wide basis which will eliminate this ridiculous situation.

Beverage statutes.—

Continental Distilling Sales Company v. Vocelle, Fla.
—So. 2d. Adv.——This case was an original mandamus proceeding in the supreme court, the purpose of which was to coerce the respondent into issuing to the relator a license to do business as a distributor of intoxicating beverages in this state. Section 561.24, Florida Statutes, 1941, prohibits a manufacturer manufacturing spirituous liquors in any state other than this state from having such license and the director declined to issue same on the ground that the relator was subsidiary and a mere adjunct or instrumentality of a parent corporation that was such a manufacturer and that, therefore, he could not issue the license by virtue of said section. The court held that the parent and the subsidiary were separate corporate entities, that the statute did not prohibit the issuance of the license and the respondent was ordered to approve the application for such license and see that it was issued. Legislation should be enacted to correct the possible repetition of a similar decision. Section 561.42, Florida Statutes, 1941, relating to the so-called "tied house evil," prohibits a licensed manufacturer or distributor from having any financial interests, directly or indirectly, in the establishment or business of any vendor (retail dealer) licensed under the beverage law and otherwise restricts the relationship between such a vendor and manufacturer or distributor. It would appear that if this section contains any merit, the aforesaid section 561.24 should be amended to contain similar provisions. A really interesting feature in this case developed when the respondent filed a suggestion that the court lacked jurisdiction to proceed because neither the governor nor his order on the aforesaid application was before the court. The application for the license was approved by the board of county commissioners of the county in which it was made and subsequently disapproved by the director. In these circumstances, it is required by section 561.20, Florida Statutes, 1941, that the findings and evidence before the board of county commissioners and the findings and evidence before the director be certified to the governor "who shall finally order the application to be granted or denied as justice shall require." Although the governor, under the quoted provision, had ordered the application denied, the relator brought his suit directly against the director, a subordinate to the governor under the beverage law, and the record did not contain the order of the governor or reflect his reasons for ordering the application denied. The state took the position that under the last mentioned section the order of the governor was just as much due process of law as the judgment of a court (and such is the law) and that certainly the court could not pass upon the matter in the circumstances; however, the suggestion was denied without opinion and despite the fact that the opposing counsel was never able to cite any law in his oral argument or brief in contradiction of our position. Therefore, it appears that the requirement that such a matter be referred to the governor is a time-consuming, needless, and fruitless step and that section 561.20 should be amended so as to eliminate such step from the procedure therein contained.

State and county officers and employees' retirement systems.—

The legislature of 1945, by chapters 22831, 22863 and 22938, laws of Florida, acts of 1945 (chapters 121, 321 and 134, respectively, Cumulative Supplement to Florida Statutes, 1941) provided retirement systems for county officers and employees, officers and employees of the state

highway patrol, and state officers and employees. The validity of these statutes was involved in the following cases:

State v. Lee,..... Fla....., 24 So. 2d. 798.—In this case the supreme court of this state held valid chapter 22938, laws of Florida, acts of 1945 (chapter 134, Cumulative Supplement to Florida Statutes, 1941) setting up a retirement system for county officers and employees.

State v. Kirkman,..... Fla....., 27 So. 2d. 610.—There was an attempt in this case to obtain from the courts an adjudication as to the validity of chapter 22863, laws of Florida, acts of 1945 (chapter 321, Cumulative Supplement to Florida Statutes, 1941), setting up a retirement system for the officers and employees of the state highway patrol; however, instead of determining the validity of the statute the lower court dismissed the cause upon purely technical grounds and the supreme court affirmed the cause without deciding the validity of the enactment.

State v. Lee,..... Fla....., 28 So. 2d. 104.—In this case the supreme court of this state held valid chapter 22831, laws of Florida, acts of 1945 (chapter 121, Cumulative Supplement to Florida Statutes, 1941) setting up a retirement system for state officers and employees.

State building fund.—

State v. Lee,..... Fla....., 27 So. 2d. 84.—Chapter 22,820, laws of Florida, acts of 1945 (sections 282.24-282.26, Cumulative Supplement to Florida Statutes, 1941) created a state building fund from which funds are to be taken for the purpose of constructing the buildings and improvements authorized by the enactment. Under the terms of this act the board of commissioners of state institutions and the state budget commission had certain powers and duties concerning the allocation of funds into the said state building fund. Upon a difference of opinion between the state comptroller and the membership of said board and commission a proceeding in mandamus was brought (Caldwell, et al., v. Lee, Fla., 27 So. 2d. 84) against the comptroller, by the board of commissioners of state institutions and the state budget commission to determine this difference of opinion. The effect of the proceeding was to coerce the state comptroller to comply with certain resolutions of the said board and commission and to transfer certain funds into the state building fund. The effects of the decision in the case as applied to the facts thereof, are summarized as follows: (1) The ascertainment of unneeded "surpluses" or "balances" in the various funds of the state and funds and appropriated balances of state departments by the budget commission, and the setting aside by said commission, with approval of the governor, of such unneeded funds, and the covering of same into the state building fund, as contemplated by section 2 of the act, did not constitute an unlawful delegation of the legislature power; (2) the specifically described items and respective amounts opposite such items, as set forth in groups "A," "B" and "C" of section 1 of the act, are estimates only, and the state board of administration is bound neither by the specific items nor amounts but may modify the same, within its discretion, as it sees fit to accomplish legislative intention; and (3) that the transfer of surpluses and balances from other funds to the state building fund to meet the program of the board of commissioners of state institutions and the use of such moneys for said purpose is not invalid because of indefiniteness of appropriation. It will be observed that the effect of such decision is to vest in the executive branch of the state government the power to use state funds for a state building program of the character and to an amount and degree limited only by the total of such "surpluses" or "balances"; and since such construction has been given the act, it is considered proper to call the same to the attention of the legislature so that it may determine whether or not it intended to surrender any of its constitutional powers and prerogatives.

Juvenile court of Monroe county.—

Watson v. Roberts,..... **Fla.**....., 25 So. 2d. 888.—The 1945 legislature enacted chapter 22898, laws of Florida, acts of 1945, applicable to all counties having a population of 14,000 to 14,200, transferring the powers and duties of juvenile judges in such counties to the county judge of such counties. Under the above stated population the act applied only to Monroe county. Because of the uncertainty of the validity and effect of the act a proceeding in quo warranto was brought in the supreme court against the judge of the juvenile court to determine whether or not his office was in any way affected by the said act. Because of the uncertainty of the validity and effect of the act, for some months following its enactment neither the juvenile judge nor the county judge would act in juvenile matters. In the said quo warranto proceeding the supreme court held the said act invalid and unconstitutional, thereby removing any doubt as to the jurisdiction over juveniles in Monroe county.

Unemployment compensation questions.—

The attorney general has participated, with counsel for the unemployment compensation division of the industrial commission, in four unemployment compensation cases; however, from the standpoint of remedial legislation there appears to be no point in more than mentioning them. These cases are as follows: *Texas Company v. Florida Industrial Commission*, 155 Fla. 536, 20 So. 2d. 680 (holding that where a subsidiary is merged into a holding corporation owning all of its stock such holding company succeeded to subsidiary's business, and was entitled to have contributions under unemployment compensation law calculated on merit rate of subsidiary's employment record); *Florida Industrial Commission v. Orange State Oil Co.*, 155 Fla. 772, 21 So. 2d. 599 (holding that bulk station distributors of oil company's products under contract which court construed made them independent contractors, not employees under unemployment compensation law); *International Power and Paper Co. v. Florida Industrial Commission*, in Leon Circuit Court (controlled by Texas Co. case above); and *Gulf Oil Corporation v. Florida Industrial Commission* (now pending in the circuit court of Leon county and involving construction and application of the subcontractor clause of the unemployment compensation law).

Insurance statutes and laws.—

The legislature of 1945 enacted three laws relating to insurance and insurers doing business in this state, to wit, chapters 22671, 22737 and 22749, laws of Florida, acts of 1945. Chapter 22671 (sections 205.43 and 205.44, Cumulative Supplement to Florida Statutes, 1941) assessed a license tax against insurers doing business in this state, which included a premium tax against both domestic and foreign insurers. The premium tax against domestic insurers was new in the 1945 act. This act set up a method of computing and paying these premium taxes. This chapter became effective on May 23, 1945. Chapter 22749 (section 205.44-1) provided an optional method of computing and paying premium receipt taxes by insurers. The legal effect of this chapter may have been to favor domestic insurers over foreign insurers. This chapter became effective May 30, 1945. Chapter 22737 (section 205.45) amended the existing statute relating to insurance agents and solicitors and licenses in connection therewith. Some provisions of these statutes have been involved in the following cases:

Modern Woodmen v. Larson.—This was a proceeding in the circuit court of Leon county for declaratory decree construing chapter 22737 which required license taxes of insurance agents within its purview. The question presented by the pleadings was whether or not agents of fraternal benefit associations were within the purview of the chapter, the court held that they were not.

Prudential Insurance Company cases.—These cases involved a construction of chapter 22749 (section 205.44-1, Cumulative Supplement to

Florida Statutes, 1941) and the effect of such chapter upon the construction and validity of chapter 22671 (sections 205.43 and 205.44 as amended) and the validity of former sections 205.43 and 205.44, Florida Statutes, 1941, which were expressly repealed by said chapter 22671. Chapter 22671 provides license and premium taxes against insurers and, among other things, included in its premium tax feature domestic insurers theretofore exempt from such a tax. Former section 205.43, Florida Statutes, 1941, contained no premium tax against domestic insurers. Chapter 22749, in effect and in part, provides that insurers required to pay premium taxes in this state may take credit on such taxes an amount equal to the proportion or percentage of said premium tax which the proportion or percentage of the total amount of all premiums received from policyholders in this state bear to the total of all premiums received by the insurer on policies and annuity contracts wherever written. In two cases (Prudential Insurance Company v. Larson) instituted in the circuit court of Leon county, one a mandamus action and the other a proceeding for a declaratory decree, the plaintiff sought the refund of approximately \$125,000 representing 1946 premium taxes paid by it (under protest) in pursuance of said chapter 22671. Plaintiff contended that chapters 22671 and 22749 were parts of a single plan for taxation, and that chapter 22749 rendered such tax discriminatory as to foreign insurers. However, on or about June 3, 1946, the Supreme Court of the United States rendered a decision (Prudential Insurance Company v. Benjamin, 326 U. S. . . ., 66 S. Ct. 1142, 90 L. Ed. Adv. 1023) upholding a South Carolina statute, which concluded the questions raised in the above suits in the circuit court of Leon county. After the decision in the above case by the Supreme Court of the United States the plaintiff dismissed the above cases in the circuit court of Leon county. The same plaintiff had two other similar suits, involving the validity of prior sections 205.43 and 205.44, Florida Statutes, 1941, then pending on appeal in the state supreme court, for the refund of approximately \$110,000.00 paid by it, under protest, about March 1, 1946, which appeals were also dismissed upon motion of the said Prudential Insurance Company as appellant.

Independent Life and Accident Insurance Company v. Larson.—This was a proceeding in the circuit court for Leon county for a declaratory decree and injunction relief and involved the construction of chapter 22671, laws of Florida, acts of 1945 (sections 205.43 and 205.44, Cumulative Supplement to Florida Statutes, 1941) which has been hereinbefore described. The plaintiff contended that the act in question was a premium tax payable at the end of the tax year, the defendant contended that it was a license tax to be measured by the premiums collected during the previous year. The plaintiff contended that it should be taxed only on those premiums paid after the effective date of the act, May 22, 1945, for the tax year of 1945. The circuit court sustained the contention of the plaintiff and the defendant appealed the cause to the state supreme court where the same is now pending on said appeal.

Criminal cases of interest.—

Snipes v. State, 156 Fla. 85, 22 So. 2d. 506.—The appellant, a negro, shot and killed the sheriff of Walton county, for which he was convicted in the circuit court. The supreme court reversed this conviction on the grounds that the evidence showed that if the appellant fired the fatal shot he fired it in lawful self-defense. The cause was remanded to the circuit court with directions to discharge to the appellant.

Walker v. Mayo, 156 Fla. 537, 23 So. 2d. 673.—Early Walker was released on conditional pardon by the pardon board, the condition being that it might be revoked by the "board" if he did not thereafter live a law-abiding and peaceful life. His conditional pardon was revoked and, upon his return to the state prison, he obtained a habeas corpus writ from the supreme court upon his claim that the revocation was im-

proper. In the order of revocation, it appeared that the governor did not join in the revocation. Walker filed a motion for discharge in which he contended that, inasmuch as section 12 of article IV of the Florida constitution required the governor to join in the granting of a conditional pardon, it was equally necessary for the governor to join in the revocation of such conditional pardon. The court, however, recognized the validity of the revocation by stating in the opinion that "... The board of pardons rescinded and canceled the aforesaid conditional pardon previously issued to Early Walker. . . ." The case should be kept in mind for future use in case a prisoner should claim that the concurrence of the governor is essential to the revocation of a conditional pardon whose condition provides for revocation by the "board."

Powell v. State, 156 Fla. 563, 23 So. 2d. 727.—This is the only instance that I know of where an accused was convicted of the common law crime of maintaining a disorderly house. The conviction was affirmed on appeal.

Brown v. Mayo, 156 Fla. 144, 23 So. 2d. 273.—In this case the supreme court construed the Florida gain time law (section 954.06, Florida Statutes, 1941). The construction placed on this law by the court allowed a prisoner less gain time than the prison division had been computing, with the result that the prison division revised its system of computation so as to be in accord with the decision.

Patterson v. State,..... Fla....., 25 So. 2d. 713.—This is a case in which Patterson was convicted of first degree murder and given the death penalty for shooting a Daytona Beach policeman who stopped his car for investigation. Patterson applied to the United States Supreme Court for writ of certiorari, which was denied.

Moorman v. State,..... Fla....., 25 So. 2d. 563.—Moorman was charged with making an assault with a deadly weapon, to wit, a rifle, with intent to commit murder, and was convicted of aggravated assault. On appeal he contended that the state had failed to show that the rifle was a deadly weapon because there was no direct testimony that it was loaded. The supreme court rejected this contention and held that it was sufficient for the state to prove by circumstantial evidence that the rifle was loaded, without producing direct proof that it was loaded.

Mitchell v. State,..... Fla....., 25 So. 2d. 73.—This case involved the constitutionality of the last paragraph of section 932.05, Florida Statutes, 1941, providing that if an indictment charging a capital offense is returned after two years from the commission of the offense, then a verdict can be rendered for any lesser offense included in the indictment. The supreme court held that this provision was unconstitutional as denying equal protection of the law to a person falling within its terms. The theory of the decision was that a man should not be convicted of a noncapital offense under an indictment brought after two years from the commission of the offense merely because the indictment charged a capital offense, when another man could not be convicted of any offense if indicted for the same noncapital offense after the expiration of two years.

Whaley v. State,..... Fla....., 26 So. 2d. 656.—So far as I know, the point involved in this case had not theretofore been decided by the supreme court. The evidence showed that Whaley gave his wife a beating in the woods; that he then got her in his car and, while driving down the road, got mad and drew back his fist as though he were going to hit her again; that, through fear, she jumped out of the car and was killed. The supreme court affirmed his conviction of manslaughter.

Sapp v. State,..... **Fla.**....., 26 So. 2d. 646.—This is another case of the first impression in Florida. Sapp went to the bank to cash a \$36.00 check given him in payment of an installment due him for disability compensation. The amount of the check, \$36.00, was written out in full. Then, followed a statement of the total amount of compensation payments made to him up to that date, totaling \$4,328.37, which amount was stated in figures preceded by a dollar mark. The bank teller noticed this \$4,328.37 but carelessly failed to observe that the amount of the check was only \$36.00, with the result that she paid him \$4,328.37. He walked off with the \$4,328.37 and kept it. It was established by the testimony of the teller and of witnesses who happened to be in the line at the time the payment was made to Sapp that he knew that he was receiving an amount vastly in excess of the amount of his check. His subsequent conduct also supported the state's theory that he knew he was getting too much money. He was convicted of larceny and, on appeal, the supreme court affirmed the conviction. (It is to be observed that the evidence showed that he knew at the time he accepted the money that he was getting too much. If the state had failed to prove this, he could hardly have been properly convicted of larceny.)

Atkinson v. State, 156 Fla. 449, 23 So. 2d. 524.—This is an unusual case in that the hotel keeper was convicted of keeping a house of ill fame because he permitted people to use the hotel rooms for the purpose of prostitution.

Giblin v. Sullivan,..... **Fla.**....., 26 So. 2d. 509.—Vincent C. Giblin, a former circuit judge, filed a pleading in the circuit court of Dade county, in which he charged Judge Milledge, of that circuit, with being in league with a gambling syndicate and with favoring the syndicate in a pending case because of such unholy alliance. Judge Milledge, without notice and without hearing, adjudged Giblin to be in contempt of court and sentenced him to serve six months in the county jail. Upon habeas corpus proceedings, the supreme court held that Giblin had not been accorded due process of law and discharged him from the sheriff's custody. A sequel to this case is that a rule was thereafter issued against Giblin requiring him to show cause why he should not be punished for contempt. Another circuit judge heard this proceeding, found Giblin guilty, and sentenced him to serve thirty days in jail and pay a \$2,000.00 fine, and, in default of such payment, to serve an additional thirty days in jail. Giblin appealed this conviction to the supreme court, and obtained its reversal.

Herndon v. State,..... **Fla.**....., **So. 2d.**..... —This case made new law in Florida. Herndon was charged with stealing \$5,000 from his wife. The trial court quashed the information upon the theory that a man can't steal from his wife in Florida. Upon appeal taken by the state, the supreme court reversed the ruling and held that a man can commit larceny of his wife's money.

Wade v. Mayo, CCA 5th,..... **Fed. 2d.**..... and **Johnson v. Mayo**,..... **Fla.**....., **So. 2d.**..... —Donald Wade was convicted in the criminal court of record of Palm Beach county for the offense of breaking and entering. He obtained a writ of habeas corpus from one of the United States district judges. On final hearing in the habeas corpus proceedings, the district judge held that the conviction was invalid because the criminal court of record judge had refused to furnish counsel for Wade upon the latter's request, it appearing, to the district judge, that Wade was indigent and was not capable of adequately representing himself. The defendant appealed the case to the United States Circuit Court of Appeals. Pending the appeal, the same question came before the state supreme court when John R. Johnson applied for a writ of

habeas corpus. The Supreme Court of Florida held that neither section 11 of the Declaration of Rights of Florida nor the Florida Statutes nor the United States Constitution required the appointment of counsel for an indigent defendant in a noncapital case in Florida. Upon oral argument of the appeal in the Wade case, a certified copy of the Florida Supreme Court's opinion in the Johnson case was presented to the circuit court of appeals. In November, 1946, the circuit court of appeals reversed the judgment of the district court, the effect of the reversal being that the district court was in error in deciding that the law required the appointment of counsel for Wade.

State Improvement Commission.—

The case of *State ex rel., Watson v. Caldwell, et al.*, 156 Fla. 618, 23 So. 2d. 855, 24 So. 2d. 797 was a proceeding in quo warranto brought by the attorney general for the purpose of testing the validity of the statutes setting up the Florida State Improvement Commission. The validity and constitutionality of the statute was upheld by the supreme court in this case.

It is hoped that the matters brought to the attention of Your Excellency in this part of the report may be found helpful and of some assistance to you in working out solutions of problems of state government. I respectfully tender my services for any future contributions within my power and ability to give.

PART II

THE OFFICE OF ATTORNEY GENERAL IN FLORIDA

The attorney general of Florida derives his office from the people. He is elected by popular choice and acquires his powers and authority and is charged with the duties of his office from three primary sources: First, the common law; second, the Constitution of Florida; third, the statutory law of Florida.

Judicial decision, interpretation and construction enter the picture by way of defining, declaring and designating this authority and these duties within the common law, constitutional and statutory, grant and limitation.

COMMON LAW POWERS, DUTIES AND AUTHORITY

He is as much the representative of the State of Florida in the supreme court, as the King's Attorney General is his representative in the Court of King's Bench. It is his sole duty to appear in and attend to, in behalf of the state, all suits or prosecutions, civil or criminal, or in equity, in which the state may be a party, or in anywise interested, in the supreme court of this state. At common law his office is in many respects judicial in character and he is clothed with a considerable discretion. If the power exists, it is not a question of right in him to institute the necessary proceeding when in his opinion a condition exists which requires the exercise of the power. It is a matter of duty. At common law it is his duty to prosecute all actions necessary to protect state's property and revenue; to represent the state in all criminal cases before the appellate court; to revoke and annul grants made by the state improperly or when forfeited by the grantee; to determine the right of anyone who claims or usurps any office; to vacate the charter or annul the existence of a corporation for violations of its charter or for omitting to exercise its corporate powers; to enforce trusts; to prevent public nuisances; and in the absence of express legislative restrictions, to exercise all such power and authority as public interest may require. *State ex rel Landis, Attorney General, et al vs. S. H. Kress & Co.*, 115 Fla. 189, 155 So. 823.

CONSTITUTIONAL POWERS, DUTIES AND AUTHORITY

Article IV, Section 22 of the Constitution of Florida, provides as follows: "The Attorney General shall be the legal advisor of the Governor and of each of the Officers of the Executive Department, and shall perform such other legal duties as may be prescribed by law. He shall be the Reporter for the Supreme Court." The full import of this constitutional field of duty has never been defined by the Supreme Court of Florida. Courts of other states have gone very far in their application of similar provisions in the charge of legal duty, responsibility and field of legal representation held to belong to the office.

STATUTORY POWERS, DUTIES AND AUTHORITY

In addition to his common law and constitutional powers, duties and authority, the attorney general has the following general and regular statutory powers, duties and authority, to:

1. Make a written report on the effect and operation of the acts of the last previous legislative session, and the decisions of the court thereon, to the governor, five days before the first day of every session of the legislature (\$16.05).*

*Reference is to Florida Statutes, 1941.

2. Recommend, at the convening of every session of the legislature, a person experienced in indexing to supervise and assist the indexing clerks of each house in making the index for both journals and to prepare the journals in bound form (§16.04).

3. Prepare marginal abstracts to the several sections of the statutory law and a general alphabetical index to the general acts of each session of the legislature (§16.44).

4. Exercise all powers and perform all duties incident to such office and to make and keep in his office a record of all official acts and proceedings, such record to contain copies of his opinions (§16.01).

5. Give his official opinion and legal advice in writing on any matter touching their official duties, upon the written requisition of the governor, secretary of state, treasurer, comptroller or superintendent of public instruction (§16.01 and §22, Art. IV, Fla. Const.).

6. Appear in and attend to suits or prosecutions in any of the courts of the state or in any courts of any other state or of the United States in behalf of the State of Florida (§16.01).

7. Exercise general superintendence and direction over the several state attorneys (§16.08).

8. Report the decisions of the supreme court, have them prepared in printed volumes and keep one copy of each in his office (§§25.29, 25.30).

9. Prepare and cause to be printed copies of fee bills of the various officers of the several counties of the state and to send copies of same to such county officials (§58.07).

10. Approve the bond of the comptroller (§17.01).

11. Prosecute combinations against Florida meats (§544.02).

12. Investigate and rectify commercial discriminations (§§540.02-540.05).

13. Enjoin violations of the laws regulating commercial foodstuffs (§580.19).

14. Conduct condemnation proceedings on behalf of the Board of Commissioners of State Institutions and on behalf of the adjutant general's office for military purposes (§§73.22, 250.48).

15. Approve articles of incorporation for co-operative marketing associations (§618.04).

16. Bring proceedings to forfeit charters of corporations which violate the laws or fail to comply with mandatory requirements of same (§§542.03, 542.04, 542.09).

17. Enforce the antitrust laws of the state (§542.03).

18. Bring proceedings, under certain conditions, to annul franchises of corporations not for profit (§617.09).

19. Approve title to real estate in which the state is interested (§135.16).

20. Pass upon permits of associations doing business under a declaration of trust (§§517.03, 609.05).

21. Represent the state in disbarment proceedings in the supreme court (§39.28).

22. Pass upon and approve regulations of district drainage boards (§298.53).

23. Bring proceedings against fair associations for annulment of their charters when laws relating to same are violated (§§615.11, 616.09).
24. Conduct proceedings against insolvent or defaulting insurance companies (§§626.08, 626.12).
25. Conduct quo warranto proceedings (§§80.03, 875.19).
26. Act as attorney for the Railroad Commission (this work is negligible because of the fact that the Railroad Commission has authority to employ its own special counsel) (§§350.29, 350.30, 350.62, 350.66).
27. Attend to all legal business arising in connection with the laws governing the salt-water fishing industry (§373.22).
28. Prepare contracts for purchase of uniform school books (§233.16).
29. Devise and furnish a form of seal for all the courts of the state (§26.48).
30. Bring proceedings, under certain conditions, for annulment of franchises of social clubs (§617.09).
31. Give special attention to legal proceedings in connection with the sponge fishing industry (§373.22).
32. Conduct suits on bonds of state health officer (§381.10).
33. Act as legal advisor and attorney for the State Plant Board (§581.02).
34. Act as legal advisor for the State Road Department. Said department, however, has a special attorney authorized by statute (§341.17).
35. Sue to recover fines for doing business without a license (§625.17).
36. Conduct prosecutions against defaulting and delinquent surety companies (§626.08).
37. Assist in fixing values of securities deposited with the state treasurer by trust companies under the trust law (§655.10).
38. Enforce the Vital Statistics Law (§382.37).
39. Act as attorney for the State Racing Commission. Said commission, however, has statutory authority to employ its special counsel (§550.01).
40. Act as attorney for the Parole Commission (§947.11).
41. Act as ex officio member and legal advisor of the State Defense Council (§249.03).
42. Conduct extradition hearings for the governor (§941.04).
43. Participate with other states in preserving the constitutional integrity of the state (§16.52).
44. Represent the state treasurer in connection with claims for funds deposited with him by receivers, trustees, legal representatives and other fiduciaries (§§69.04, 69.06, 69.07).
45. Devise a suitable seal for the supervisors of registration (§98.51).
46. Represent the insurance commissioner in connection with insurance matters (§§637.54, 640.13).
47. Represent the state in proceedings to suspend or revoke licenses of labor union business agents (§481.10).

48. Represent the state in proceedings under the Declaratory Judgments Law where the constitutionality of statutes is involved (\$87.10).
49. Assist in the enforcement of the Basic Science Law (\$456.22).
50. Assist in the collection and enforcement of chain store license taxes (\$204.13).
51. Call a biennial session of circuit judges to consider their report on desirable or necessary legislation (\$16.06).
52. Bring proceedings to test the validity of the incorporation of co-operative marketing associations and nonprofit co-operative associations (§§618.23, 619.09).
53. Bring proceedings to recover escheated property (\$731.33).
54. Bring proceedings to forfeit prize money in lotteries (\$849.12).
55. Assist in the enforcement of the laws regulating the sale of milk, cream and milk products (\$502.26).
56. Bring proceedings against combinations in restraint of motor vehicle financing (\$545.08).
57. Assist in the enforcement of laws regulating the practice of optometry (\$463.19).
58. Approve the form for bonds of nonresident outdoor advertisers (\$479.06).
59. Represent the commissioner of agriculture in connection with the enforcement of the Pure Seed Labeling Law (\$578.15).
60. Assist in the enforcement of the laws regulating small loan businesses (\$516.23).
61. Direct and be in charge of the Statutory Revision Department (§§16.43-16.51).
62. Represent the state in tax lien foreclosure proceedings by municipalities involving Murphy Act lands (\$196.21).

MEMBERSHIP IN BOARDS, COMMISSIONS AND COUNCILS

The attorney general is a member of the following state boards, commissions and councils:

1. Board of Commissioners of State Institutions (Fla. Const. §17, Art. IV).
2. State Board of Education (Fla. Const. §3, Art. XII).
3. Trustees of Internal Improvement Fund (\$253.02, Florida Statutes, 1941).
4. State Board of Drainage Commissioners (\$298.69, Florida Statutes, 1941).
5. State Budget Commission (\$216.01, Florida Statutes, 1941).
6. State Board of Conservation (§§373.01, 377.07, Florida Statutes, 1941 and 1945 Cumulative Supplement to Vol. I).
7. State Board of Pardons (Fla. Const. §12, Art. IV).
8. State Canvassing Board (\$99.49, Florida Statutes, 1941).
9. Florida Securities Commission (\$517.03, Florida Statutes, 1941).
10. Railroad, etc., Assessment Board (\$195.01, Florida Statutes, 1941).

11. Board for fixing values of investment securities of trust companies (§655.10, Florida Statutes, 1941).
12. Board for supervision and regulation of forms to be used for assumption of risks by surety companies (§648.16, Florida Statutes, 1941).
13. State Housing Board (§424.04, Florida Statutes, 1941).
14. Florida Economic Advancement Council (§120.01, 1945 Supplement, Florida Statutes, 1941).
15. Department of Public Safety Executive Board (§321.01, Florida Statutes, 1941).
16. State Board for Vocational Education (§229.08, Florida Statutes, 1941).
17. Board of Trustees of the Teachers' Retirement System (§238.03, Florida Statutes, 1941).
18. State Textbook Purchasing Board (§233.13, Florida Statutes, 1941).
19. Ex officio member of Florida State Defense Council (§249.03, Florida Statutes, 1941).
20. Governor's Cabinet (Fla. Const. §20, Art. IV).

STATUTORY REVISION DEPARTMENT

The 1943 legislature created a permanent statutory revision, legislative drafting and reference department, which is designated and known as the statutory revision department, under the direct supervision and control of the attorney general (§§16.43 et seq., 1945 Cumulative Supplement to Florida Statutes, 1941). The powers, duties and functions of the said statutory revision department are set out in full in the above cited statutes.

In compliance with the foregoing statutes, the statutory revision department was set up and developed, as a department, in the office of the attorney general and under his direct supervision and control. The work of the said statutory revision department is now carried on under the following plan and system.

Continuing plan of operation.—The statutory revision department operates, as directed under the statutes (see §§16.11-16.51, Florida Statutes, 1941, and its 1945 Cumulative Supplement), to the fullest extent and according to the intent and purpose of the above statutes and of the legislature, its work being carried forward in a continuous manner and in the following objective classifications:

(1) Continuing a systematic study of general statutes and laws for the purpose of reducing bulk, removing inconsistencies, eliminating redundancies and surplusages, correcting mistakes in grammar, punctuation, language, etc., combining and consolidating duplicate laws and otherwise performing the revisory function contemplated in the law and providing for said revision by revisers' bills to be submitted to each session of the legislature.

(2) Carrying on the cumulative supplemental compilation of the statutes subject to the department codification according to the system and manner of numbering and classifying as now established, and in doing so, convert the session laws as passed by each session of the legislature into their appropriate place in Florida Statutes, 1941—Volume I in conformance to said system.

(3) Preparing marginal abstracts and an index of the general acts and resolutions, and an index to the local acts of the legislature, after the adjournment of each session.

(4) Indexing each of the journals of the two branches of the legislature.

(5) Preparing and having printed from time to time such number of copies as may be required of supplements to Volumes I, II and III of Florida Statutes, 1941, and secure copyrights on same.

(6) Maintaining a system for compiling and preserving material, for use at such time as the legislature may direct another complete revision and compilation of the general statutes and laws.

(7) Maintaining a bill drafting department and legislative reference library in conformance with legislative authorization.

(8) Carrying on a continuous system of compiling supplemental material to Volumes I, II and III. This work, with respect to Volume II, is kept up to date from day to day, and information therefrom is furnished to the members of the bench and bar upon request.

(9) Carrying on a continuous reworking of the general index to Volume I and its current Cumulative Supplement. Keeping such index material compiled in such form as to facilitate the printing of a revised index at any time.

(10) Preparing, compiling and having printed such handbooks, and other publications of the attorney general, as may be required by law, or that in the opinion of the attorney general, where authorized, is deemed advisable.

(11) Assisting other state departments, bureaus and agencies in compiling laws affecting their activities and operation, and lending such assistance as may be required in having such compilations printed in proper form.

(12) Maintaining contacts with similar departments in other states, and with lawbook publishing companies and editors who show a tendency to cooperate and exhibit an interest toward the mutual betterment and advancement of work in this field.

Preservation of type used.—All type used in printing publications of the statutory revision department is required by law to be preserved, and is stored and protected by adequate insurance in conformity with such law.

Selection and supervision of personnel.—Personnel is selected and maintained according to the best talent available, and the work of the department is assigned and distributed to the personnel in such manner as to secure the best results, giving consideration to the particular talents of each person. Generally, however, responsibility is divided as follows:

(1) General supervision is under the attorney general, and for administrative purposes, under the general office administrative assistant, and for revision, annotation and other departmental technical work and objectives, under the chief reviser.

(2) Principal study of the statutes, revisions and preparation of revisers' bills is under a qualified chief reviser and with an assistant; such chief reviser and assistant have supervisory charge over the personnel of the revision department and directing authority and charge over the technical work of the department.

(3) Indexing and continuous study and revision of index material is by a qualified indexer who is under the administrative supervision of the chief reviser.

(4) Annotating and related work is kept up to date under the supervision of the chief reviser.

(5) Proofreading and checking is carefully and meticulously done by qualified persons.

(6) Stenographic and clerical work is performed by accurate and careful stenographers and clerks.

(7) Bill drafting and research between and during sessions of the legislature is done by such members of the department and the attorney general's office as may be qualified for such work, under the direction of the attorney general originally and upon recommendation and advice of the chief reviser.

The revisers' bills, as provided by statute, are prepared by the reviser and the department under his direction. The principal objectives of revisers' bills are to correct, amend, consolidate, revise, repeal or otherwise immaterially alter or change any general statute or law, or parts thereof, of a general nature and application which may appear to be subject to revision but without changing substance, or altering operation and effect. They do not deal with:

(1) Statutes relating to or concerning only one or more counties or municipalities, or parts thereof, except in certain cases where the subject matter relates to the creation or jurisdiction of state, county or municipal courts.

(2) Statutes relating to, concerning or that would be operative in only a portion of the state, except in cases where the subject matter relates to the creation or jurisdiction of state or county courts.

(3) Statutes relating to or concerning only a certain municipal corporation.

(4) Statutes relating to or concerning only one or more designated individuals or corporations.

(5) Statutes incorporating a designated individual corporation or making a grant thereto.

(6) Road designation laws.
The omission of any statute coming within the classifications aforesaid is properly accounted for in the tables or indexes as carried forward in the Cumulative Supplements.

In the compilation of material and the drafting of revisers' bills, the following rules and procedure are adhered to:

- (1) A continuing and systematic study of the statutes is carried on.
- (2) A careful search is made for:
 - (a) Inappropriateness of run-in lines to sections.
 - (b) Misspelled words and poor punctuation.
 - (c) Statutes limited as to time of operation and which have expired.
 - (d) Sections, or parts of sections, that conflict with or the operation of which is inconsistent with the logical operation of other sections.

(e) Laws that have become obsolete.

(f) Sections that are so poorly written that the meaning is not clear or that may be subject to more than one interpretation.

(g) Sections containing lengthy and superfluous matter that may be rewritten for the sake of brevity.

(h) Sections that are poorly or incorrectly phrased in their reference to other parts of the statutes, or otherwise.

(i) Sections that, because of amendments and additions to the statutes, should be renumbered and placed in different sequence.

(j) Sections, or parts of sections, that have been constructively repealed or made inoperative by other laws.

(k) Conflicting powers and duties of officials.

(l) Repetitious statutes.

The department carries continuing notes extracted from the annotations as to the construction, operation, validity or constitutionality of the laws; maintains a running file containing a list of errors, suggestions, etc., that are submitted by other persons; and maintains a system of keeping comprehensive notes and data for the final preparation of the revisers' bills. In the preparation of revisers' bills, sections containing new material to be added or for the purpose of replacing existing sections are written with due regard to brevity, using as plain and modern language as possible and simple rather than complex words and phrases, with due regard to correct punctuation, avoiding verboseness and repetitions.

Each reviser's bill is accompanied by complete explanatory memos.

Printing.—Departmental printing is advertised and bids received for it according to the requirements of law. In addition, invitations to bid are mailed, with copies of specifications, to all qualified printers within the state. Specifications are made up as simply as possible, with due regard for the insurance of a first-class product and for the protection of the state. Specifications are made up with a view toward economy, without sacrificing quality. General specifications and requirements are compiled and used so far as possible in the contracts for printing. Wide variance in style and form from that presently used is avoided, particularly as to supplemental publications.

COMPILED STATEMENT OF CASES HANDLED IN THE ATTORNEY GENERAL'S OFFICE (From Jan. 1, 1945 Through Dec. 31, 1946)

CIVIL CASES

Number of cases pending January 1, 1945		502
Number of cases docketed between January 1, 1945, and December 31, 1946, inclusive,		
Docketed and still pending	129	
Docketed and closed	221	350
		852
Number of cases disposed of between January 1, 1945, and December 31, 1946, inclusive,		
Pending January 1, 1945, closed	293	
Docketed and closed	221	514
Number of cases pending January 1, 1947		338

CRIMINAL CASES

Number of cases pending January 1, 1945		86
Number of cases docketed between January 1, 1945, and December 31, 1946, inclusive,		
Docketed and still pending	61	
Docketed and closed	193	254
		340
Number of cases disposed of between January 1, 1945, and December 31, 1946, inclusive,		
Pending January 1, 1945, closed	86	
Docketed and closed	193	279
Number of cases pending January 1, 1947		61

TOTAL CASES

Total civil and criminal cases pending or docketed during biennium ending December 31, 1946		1,192
Total civil and criminal cases closed or disposed of during biennium ending December 31, 1946		793
Total civil and criminal cases pending January 1, 1947		399

EXTRADITION STATISTICS REQUISITIONS ON FLORIDA

During the years 1945 and 1946 the following states made requisitions on the State of Florida for fugitives from justice as indicated:

Alabama	25	Mississippi	1
California	10	New Jersey	8
Colorado	1	New York	19
Connecticut	2	North Carolina	22
Georgia	33	Ohio	6
Illinois	15	Pennsylvania	6
Indiana	2	South Carolina	10
Kansas	1	Tennessee	5
Kentucky	1	Texas	1
Maryland	2	Utah	1
Massachusetts	8	Virginia	14
Michigan	8	Washington	1
Minnesota	1	West Virginia	1
		Wisconsin	4
Total			208

REQUISITIONS BY FLORIDA

During the years 1945 and 1946 the State of Florida made requisitions on the following states and District of Columbia for fugitives from justice as indicated:

Alabama	12	Missouri	3
Arkansas	1	Nebraska	3
California	16	New Jersey	11
Colorado	1	New York	19
Connecticut	1	North Carolina	1
District of Columbia	3	Ohio	8
Georgia	20	Oklahoma	1
Illinois	7	Pennsylvania	7
Kansas	8	South Carolina	2
Louisiana	4	South Dakota	2
Maryland	6	Tennessee	7
Massachusetts	2	Texas	2
Michigan	3	Virginia	3
		West Virginia	1
Total			154

APPROPRIATIONS AND EXPENDITURES ATTORNEY GENERAL

Including Statutory Revision Department

APPROPRIATIONS

Salary Funds

Balance January 1, 1945.....	\$ 62,300.07
Appropriations July 1, 1945 to June 30, 1947.....	264,160.00
Total	<u>\$326,460.07</u>

EXPENDITURES

Salary Funds

January 1, 1945 to June 30, 1945.....	\$190,697.65
Amount Reverted July 1, 1946.....	3,682.42
July 1, 1945 to December 31, 1946.....	63,744.04
Total	<u>\$258,124.11</u>
Balance January 1, 1947.....	\$ 68,335.96

APPROPRIATIONS

Necessary and Regular Funds

Balance January 1, 1945.....	\$ 11,569.68
Appropriations July 1, 1945—June 30, 1947.....	33,840.00
Total	<u>\$45,409.68</u>

EXPENDITURES

Necessary and Regular Funds

January 1, 1945 to June 30, 1945.....	\$ 11,509.76
Amount Reverted July 1, 1946.....	458.12
July 1, 1945 to December 31, 1946.....	27,502.52
Total	<u>\$ 39,470.40</u>
Balance January 1, 1947.....	\$ 5,939.28

COLLECTIONS BY ATTORNEY GENERAL

The following collections were made on items referred to the attorney general's office, by other departments, between January 1, 1945 and December 31, 1946, inclusive:

Proceeds from condemnation suits brought by the United States	\$ 72,868.28
Proceeds from tax foreclosure suits brought by municipalities	72,607.14
Recovered on delinquent maintenance accounts of state institutions	8,344.43
Escheatments of court registry funds and estates	11,493.81
Total	<u>\$165,313.66</u>

ATTORNEYS GENERAL OF FLORIDA

Since 1845

JOSEPH BRANCH	1845-1846
AUGUSTUS E. MAXWELL	1848-1848
JAMES T. ARCHER	1848-1848
DAVID P. HOGUE	1848-1853
MARIANO D. PAPY	1853-1860
JOHN B. GALBRAITH	1860-1868
JAMES D. WESCOTT, JR.	1868-1868
A. R. MEEK	1868-1870
SHERMAN CONANT	1870-1870
J. P. C. DREW	1870-1872
H. BISSBEE, JR.	1872-1872
J. P. C. EMMONS	1872-1873
WILLIAM A. COCKE	1873-1877
GEORGE P. RANEY	1877-1885
C. M. COOPER	1885-1889
WILLIAM B. LAMAR	1889-1903
JAMES B. WHITFIELD	1903-1904
W. H. ELLIS	1904-1909
PARK TRAMMELL	1909-1913
THOMAS F. WEST	1913-1917
VAN C. SWEARINGEN	1917-1921
RIVERS BUFORD	1921-1925
J. B. JOHNSON	1925-1927
FRED H. DAVIS	1927-1931
CARY D. LANDIS	1931-1938
GEORGE COUPER GIBBS	1938-1941
J. TOM WATSON	1941-

STATE LAW DEPARTMENT

ATTORNEY GENERAL

J. TOM WATSON

ASSISTANT ATTORNEYS GENERAL

FRED M. BURNS	August, 1939
JAMES B. TONEY	January, 1941
¹ THOMAS V. KIERNAN	January, 1941
HOWARD S. BAILEY	March, 1944
FRANK J. HEINTZ	April, 1944
D. FRED McMULLEN	May, 1944
REEVES BOWEN	January, 1945
SUMTER LEITNER	February, 1945
BOLLING C. STANLEY	April, 1945
T. PAINE KELLY	July, 1945
JOHN C. WYNN	October, 1941-March, 1945
C. H. B. FLOYD	November, 1942-January, 1945
GEORGE M. POWELL	February, 1943-December, 1945
LAMAR WARREN	July, 1943-August, 1946
CECIL T. FARRINGTON	September, 1945-July, 1946
RANDOLPH CALHOUN	January, 1945-April, 1945
BLOUNT MYERS	March, 1945-July, 1945
WM. S. LINNING	July, 1945-November, 1946
J. EMORY CROSS	September, 1945-March, 1946

SPECIAL ASSISTANT ATTORNEYS GENERAL

¹ JOHN K. BALLINGER	April, 1941
¹ ERNEST W. WELCH	September, 1941
REBECCA B. MARKS	October, 1946
JESSE F. WARREN	October, 1946

LAW EDITORS

VIRGINIA C. SEARCY	June, 1945
J. W. MELVIN	October, 1943-October, 1945
JAMES H. DYSON	June, 1946-July, 1946

¹On military leave from February, 1942 to March, 1946.

²On military leave from June, 1942 to January, 1946.

³On military leave from February, 1942 to May, 1946.

LIBRARIAN AND ASSISTANT REPORTER

T. L. KARN February, 1941

SECRETARIES

MARY VALLANCE November, 1942
 IRENE A. SMITH April, 1943
 JEWELL ROBERTS GARMAN January, 1944
 LILLIAN HENRY WALKER May, 1944
 CAROLINE L. DEDGE July, 1944
 MARY L. McDONALD August, 1944
 DORIS B. DALLAS June, 1945
 IDA M. WHITTINGTON July, 1945
 CATHERINE F. TURNBULL January, 1946
 PAULINE H. EVANS March, 1946
 LUCILLE REEDER April, 1946
 PATRICIA D. ANDERSON October, 1946
 ROSE ANN NIMITZ October, 1946
 LOUELLA TAYLOR October, 1946
 FLOSSIE H. LOTT December, 1946
 EVELYN DAVIS BURNS July, 1929-March, 1946
 LUCILLE HAM January, 1941-March, 1946
 GLORIA ARANGO SELPH February, 1941-January, 1945
 VIRGINIA HAMMOND SULLIVAN March, 1941-December, 1945
 VERA ZIMMERMAN August, 1941-March, 1946
 HARRIETTE C. POMEROY September, 1941-February, 1946
 ETHEL BILLINGSLEY DAVIS March, 1944-July, 1945
 VIVIAN C. GORDY July, 1944-October, 1945
 LORENE H. WILSON September, 1944-October, 1946
 LUCILLE J. KENNEDY June, 1945-September, 1946
 ELEANOR R. VOGT June, 1945-August, 1945
 FLORINE HENRY GRIFFITH July, 1945-February, 1946
 CHARLOTTE LaTERRA September, 1945-January, 1946
 LAURA GRACE CONE LEMOS October, 1945-December, 1946
 ELIZABETH SANDFORD November, 1945-December, 1945
 MARGARET R. JERNIGAN January, 1946-May, 1946
 MAZIE NORMAN MIDDLETON March, 1946-September, 1946

STENOGRAPHERS-CLERKS

GEORGIA K. BARBER February, 1945
 LOIS A. DANIELS July, 1946
 RUTH PAYNE BOMFORD June, 1942-January, 1946
 EULENE WEEKS September, 1945-January, 1946

RECEPTIONISTS AND TELEPHONE OPERATORS

INEZ ALDERMAN REDDING May, 1944
 HELEN C. KENNEDY May, 1944-November, 1945

FILING SECRETARIES

MARGARET E. GANNON (and Bookkeeper) April, 1929
 ALBERTA G. WILLIAMSON June, 1946
 MARGARET R. HALL August, 1941-February, 1946
 NANNIE PEARL MATTAIR January, 1946-July, 1946

STUDENTS—PART TIME

MARTHA GOLDEN September, 1946
 NANCY REARDON September, 1946
 GLADYS IRENE WHITE April, 1946-September, 1946

JUDICIAL DEPARTMENT OF FLORIDA

Supreme Court Justices

TALLAHASSEE, FLORIDA

1945-1946 TERMS

Chief Justice

Hon. R. H. CHAPMAN

DIVISION A

Hon. GLENN TERRELL

Hon. RIVERS BUFORD

Hon. ALTO ADAMS

DIVISION B

Hon. ARMSTEAD BROWN*

Hon. ELWYN THOMAS

Hon. H. L. SEBRING

*Mr. Justice Brown resigned November 30, 1946 and Hon. Paul D. Barns was commissioned December 2, 1946.

1947-1948 TERMS

Chief Justice

Hon. ELWYN THOMAS

DIVISION A

Hon. GLENN TERRELL

Hon. R. H. CHAPMAN

Hon. H. L. SEBRING

DIVISION B

Hon. RIVERS BUFORD

Hon. ALTO ADAMS

Hon. PAUL D. BARNES

Hon. GUYTE P. McCORD, Clerk Supreme Court.

Hon. J. TOM WATSON, Attorney General.

Hon. LEWIS W. PETTEWAY, Attorney for State Railroad Commission.

Hon. CALVIN JOHNSON, Attorney for State Road Department.

JUDGES OF THE CIRCUIT COURTS

First Circuit.....	Hon. R. A. McGEACHY, Milton
	Hon. L. L. FABISINSKI, Pensacola
	Hon. D. STUART GILLIS, ¹ DeFuniak Springs
Second Circuit.....	Hon. EDWARD C. LOVE, ² Quincy
	Hon. W. MAY WALKER, Tallahassee
	Hon. HUGH M. TAYLOR, ³ Quincy
Third Circuit.....	Hon. R. H. ROWE, Madison
	Hon. HAL W. ADAMS, Mayo
Fourth Circuit.....	Hon. DeWITT T. GRAY, ⁴ Jacksonville
	Hon. BAYARD B. SHIELDS, Jacksonville
	Hon. A. D. McNEILL, Jacksonville
	Hon. CLAUDE OGILVIE, ⁵ Jacksonville
	Hon. BRYAN SIMPSON, ⁶ Jacksonville
Duval Circuit.....	Hon. MILES W. LEWIS, Jacksonville
Fifth Circuit.....	Hon. J. C. B. KOONCE, Tavares
	Hon. F. R. HOCKER, Ocala

¹ Commissioned June 30, 1945

² Resigned August 13, 1945

³ Commissioned August 14, 1945

⁴ Died May 9, 1946

⁵ Commissioned June 7, 1945

⁶ Commissioned June 19, 1946

Sixth Circuit.....	Hon. JOHN U. BIRD, Clearwater Hon. T. FRANK HOBSON, St. Petersburg Hon. VICTOR O. WEHLE, ⁷ St. Petersburg
Seventh Circuit.....	Hon. GEO. Wm. JACKSON, St. Augustine Hon. HERBERT B. FREDERICK, Daytona Beach
Eighth Circuit.....	Hon. A. Z. ADKINS, Starke Hon. JOHN A. H. MURPHREE, Gainesville
Ninth Circuit.....	Hon. FRANK A. SMITH, Orlando Hon. M. B. SMITH, Titusville Hon. A. O. KANNER, Stuart
Tenth Circuit.....	Hon. H. C. PETTEWAY, ⁸ Lakeland Hon. D. O. ROGERS, Bartow Hon. DON REGISTER, ⁹ Winter Haven
Eleventh Circuit.....	Hon. PAUL D. BARNES, ¹⁰ Miami Hon. RICHARD H. HUNT, ¹¹ Miami Hon. GEORGE E. HOLT, Miami Hon. ROSS WILLIAMS, Miami Hon. AQUILINO LOPEZ, Jr., ¹² Key West Hon. MARSHALL C. WISEHEART, Miami Hon. STANLEY MILLEDGE, ¹³ Miami Hon. CHARLES A. CARROLL, ¹⁴ Miami Hon. N. VERNON HAWTHORNE, ¹⁵ Miami Hon. JOSEPH OTTO, ¹⁶ Miami
Twelfth Circuit.....	Hon. GEORGE W. WHITEHURST, Fort Myers Hon. W. T. HARRISON, Palmetto
Thirteenth Circuit.....	Hon. L. L. PARKS, Tampa Hon. HARRY N. SANDLER, Tampa
Fourteenth Circuit.....	Hon. IRA A. HUTCHINSON, Panama City Hon. E. C. WELCH, Marianna
Fifteenth Circuit.....	Hon. C. E. CHILLINGWORTH, West Palm Beach Hon. GEO. W. TEDDER, Ft. Lauderdale Hon. JOSEPH S. WHITE, West Palm Beach

7 Commissioned June 13, 1945

8 Resigned March 30, 1945

9 Commissioned April 20, 1945

10 Resigned December 1, 1946

11 Resigned effective March 1, 1945

12 Commissioned June 8, 1945

13 Commissioned June 30, 1945

14 Commissioned February 26, 1946

15 Commissioned December 5, 1946

16 Term expired Senate 1945

JUDGES OF COURTS OF RECORD

Escambia County.....	Hon. ERNEST E. MASON, Pensacola
Pasco County.....	Hon. W. KENNETH BARNES, Dade City

JUDGES OF CRIMINAL COURTS OF RECORD

Dade County.....	Hon. BEN C. WILLARD, Miami
Duval County.....	Hon. BRYAN SIMPSON, ¹ Jacksonville Hon. MABRY A. CARLTON, ² Jacksonville Hon. EDWIN JONES, ³ Jacksonville
Hillsborough Co.....	Hon. JOHN R. HIMES, Tampa Hon. L. A. GRAYSON, ⁴ Tampa
Monroe County.....	Hon. THOMAS S. CARO, Key West
Orange County.....	Hon. W. M. MURPHY, Orlando
Palm Beach Co.....	Hon. EDWARD G. NEWELL, W. Palm Beach
Polk County.....	Hon. ROY H. AMIDON, Bartow

JUDGE OF COURT OF CRIMES

Dade County.....Hon. WAYNE ALLEN, Miami
 Hon. N. VERNON HAWTHORNE,² Miami

JUDGES OF CIVIL COURTS OF RECORD

Dade County.....Hon. D. J. HEFFERNAN, Miami
 Hon. NORMAN HENDRY, Miami
 Duval County.....Hon. BURTON BARRS, Jacksonville

¹ Resigned effective June 19, 1946

² Acting judge while judge on military leave

³ Commissioned June 18, 1946

JUDGES OF JUVENILE AND DOMESTIC RELATIONS COURTS

Broward County.....Hon. DORR S. DAVIS, Ft. Lauderdale
 Dade County.....Hon. WALTER H. BECKHAM, Miami
 Duval County.....Hon. W. S. CRISWELL, Jacksonville
 Hillsborough Co.....Hon. PAUL R. KICKLITER, Tampa
 Monroe County.....Hon. FRANK O. ROBERTS, Key West
 Orange County.....Hon. MATTIE H. FARMER, Orlando
 Pinellas County.....Hon. LINCOLN C. BOGUE, St. Petersburg
 Polk County.....Hon. W. F. BEVIS,¹ Bartow
 Hon. G. BOWDON HUNT,² Bartow

¹ Resigned effective October 15, 1945

² Commissioned October 5, 1945

COUNTY JUDGES

Alachua County.....Hon. H. H. McDONALD, Gainesville
 Baker County.....Hon. W. M. BROWN, Macclenny
 Bay County.....Hon. JOSEPH W. BAILEY, Panama City
 Bradford County.....Hon. E. K. PERRYMAN, Starke
 Brevard County.....Hon. VASSAR B. CARLTON, Titusville
 Broward County.....Hon. BOYD H. ANDERSON, Ft. Lauderdale
 Calhoun County.....Hon. ROY S. GASKIN, Blountstown
 Charlotte County.....Hon. JOHN T. ROSE, Jr., Punta Gorda
 Citrus County.....Hon. E. C. MAY, Inverness
 Clay County.....Hon. T. J. JENNINGS, Jr., Green Cove Springs
 Collier County.....Hon. S. S. JOLLEY, Everglades
 Columbia County.....Hon. G. A. BUIE, Jr., Lake City
 Dade County.....Hon. W. F. BLANTON, Miami
 DeSoto County.....Hon. LEWIS E. PURVIS, Arcadia
 Dixie County.....Hon. L. G. GUNTER, Cross City
 Duval County.....Hon. McKENNEY J. DAVIS, Jacksonville
 Escambia County.....Hon. HARVEY E. PAGE, Pensacola
 Flagler County.....Hon. E. W. JOHNSTON, Bunnell
 Franklin County.....Hon. RAYMOND M. WITHERSPOON, Apalachicola
 Gadsden County.....Hon. FRANK B. THROWER, Quincy
 Gilchrist County.....Hon. M. G. AKINS, Trenton
 Glades County.....Hon. J. M. COUSE, Moore Haven
 Gulf County.....Hon. J. E. PRIDGEON, Wewahatchka

Hamilton County.....	Hon. ERNEST RUTLEDGE, Jasper
Hardee County.....	Hon. CLYDE MATTOX, Wauchula
Hendry County.....	Hon. R. M. HARRIS, LaBelle
Hernando County.....	Hon. E. S. McKENZIE, Brooksville
Highlands County.....	Hon. HOWARD G. LIVINGSTON, Sebring
Hillsborough Co.....	Hon. W. C. BROOKER, Tampa
Holmes County.....	Hon. KLEIN McDONALD, Bonifay
Indian River Co.....	Hon. OTIS M. COBB, Vero Beach
Jackson County.....	Hon. D. H. OSWALD, Marianna
Jefferson County.....	Hon. THOMAS B. BIRD, Monticello
Lafayette County.....	Hon. M. GUY McCLAIN, Mayo
Lake County.....	Hon. A. S. HERLONG, Jr., Tavares
Lee County.....	Hon. HIRAM W. BRYANT, Ft. Myers
Leon County.....	Hon. JAMES C. GWYNN, Tallahassee
Levy County.....	Hon. H. S. WILSON, Bronson
Liberty County.....	Hon. R. H. DEASON, Bristol
Madison County.....	Hon. J. R. KELLEY, Madison
Manatee County.....	Hon. S. J. MURPHY, Bradenton
Marion County.....	Hon. D. R. SMITH, Ocala
Martin County.....	Hon. ARTHUR R. CLONTS, Stuart
Monroe County.....	Hon. RAYMOND R. LORD, Key West
Nassau County.....	Hon. H. V. BURGESS, Fernandina
Okaloosa County.....	Hon. WILBUR F. OSBURN, Crestview
Okeechobee County.....	Hon. T. W. CONELY, Jr., Okeechobee
Orange County.....	Hon. VICTOR HUTCHINS, Orlando
Osceola County.....	Hon. O. P. JOHNSON, Kissimmee
Palm Beach County.....	Hon. RICHARD P. ROBBINS, West Palm Beach
Pasco County.....	Hon. ORVIL L. DAYTON, Jr., Dade City
Pinellas County.....	Hon. JACK F. WHITE, Clearwater
Polk County.....	Hon. CHESTER M. WIGGINS, Bartow
Putnam County.....	Hon. CAUSEY S. GREEN, Palatka
St. Johns County.....	Hon. CHAS. C. MATHIS, Jr., St. Augustine
St. Lucie County.....	Hon. FLEM C. DAME, Ft. Pierce
Santa Rosa County.....	Hon. Wm. A. BONIFAY, Milton
Sarasota County.....	Hon. FORREST CHAPMAN, Sarasota
Seminole County.....	Hon. R. W. WARE, Sanford
Sumter County.....	Hon. P. B. HOWELL, Bushnell
Suwannee County.....	Hon. J. M. HEARN, Live Oak
Taylor County.....	Hon. D. R. PARTIN, Perry
Union County.....	Hon. J. R. TOWNSEND, Lake Butler
Volusia County.....	Hon. J. E. PEACOCK, DeLand
Wakulla County.....	Hon. A. L. PORTER, Crawfordville
Walton County.....	Hon. EDWIN B. DRAKE, DeFuniak Springs
Washington County.....	Hon. SAM D. MAY, Chipley

STATE ATTORNEYS

First Circuit.....	Hon. J. EDWIN HOLSBERRY, Pensacola
Third Circuit.....	Hon. O. C. PARKER, Jr., ¹ Tallahassee
Second Circuit.....	Hon. A. K. BLACK, Lake City
	Hon. DAVID LANIER, ² Madison

Fourth Circuit.....	Hon. WILLIAM A. HALLOWES, III, Jacksonville Hon. INMAN P. CRUTCHFIELD, ² Jacksonville
Fifth Circuit.....	Hon. J. W. HUNTER, Tavares
Sixth Circuit.....	Hon. CHESTER B. McMULLEN, Clearwater
Seventh Circuit.....	Hon. MURRAY SAMS, DeLand
Eighth Circuit.....	Hon. T. E. DUNCAN, Gainesville
Ninth Circuit.....	Hon. MURRAY W. OVERSTREET, Kissimmee
Tenth Circuit.....	Hon. L. GRADY BURTON, Wauchula
Eleventh Circuit.....	Hon. STANLEY MILLEDGE, ³ Miami Hon. GLENN C. MINCER, ⁴ Miami
Twelfth Circuit.....	Hon. CLYDE H. WILSON, ⁵ Sarasota
Thirteenth Circuit.....	Hon. J. REX FARRIOR, Tampa
Fourteenth Circuit.....	Hon. L. D. McRAE, Chipley
Fifteenth Circuit.....	Hon. PHIL O'CONNOLL, West Palm Beach Hon. SIDNEY J. CATTS, Jr., ² West Palm Beach

¹ Will be succeeded by Hon. William D. Hopkins.

² Acted while state attorney on military leave.

³ Resigned effective June 30, 1945.

⁴ Commissioned June 28, 1945.

⁵ Will be succeeded by Hon. W. M. Smiley.

ASSISTANT STATE ATTORNEYS

First Circuit.....	None
Second Circuit.....	None
Third Circuit.....	Hon. O. O. EDWARDS, Cross City
Fourth Circuit.....	Hon. NATHAN SCHEVITZ, Jacksonville Hon. THOS. J. SHAVE, Jacksonville Hon. Wm. FISHLER, ¹ Fernandina
Fifth Circuit.....	Hon. A. P. BUIE, Ocala
Sixth Circuit.....	Hon. W. H. BREWTON, Dade City
Seventh Circuit.....	Hon. JULIAN C. CALHOUN, Palatka
Eighth Circuit.....	Hon. JOE HILL WILLIAMS, Lake Butler
Ninth Circuit.....	Hon. THAD H. CARLTON, Ft. Pierce Hon. GEORGE A. DeCOTTES, Sanford
Tenth Circuit.....	Hon. WALTER W. WOOLFOLK, Lake Wales
Eleventh Circuit.....	Hon. H. FROST BAILEY, ² Miami Hon. HENRY M. JONES, ³ Key West Hon. S. O. CARSON, ⁴ Miami Hon. Wm. V. ALBURY, ⁵ Key West
Twelfth Circuit.....	Hon. W. M. SMILEY, Bradenton Hon. L. J. ROBBINS, Arcadia
Thirteenth Circuit.....	Hon. J. FRANK UMSTOT, Tampa
Fourteenth Circuit.....	Hon. E. CLAY LEWIS, Jr., Port St. Joe
Fifteenth Circuit.....	Hon. LOUIS F. MAIRE, Ft. Lauderdale

¹ Acted as assistant state attorney while Thomas J. Shave was on military leave.

² Resigned September 27, 1945.

³ Resigned August 13, 1945.

⁴ Commissioned October 4, 1945.

⁵ Commissioned August 17, 1945.

COUNTY SOLICITORS

Dade County.....	Hon. ROBERT R. TAYLOR, Miami
Duval County.....	Hon. WAYNE RIPLEY, Jacksonville
	Hon. HARRY H. MARTIN, ¹ Jacksonville
Escambia County.....	Hon. FORSYTH CARO, Pensacola
Hillsborough Co.....	Hon. LUTHER W. COBBEY, Tampa
Monroe County.....	Hon. ALLAN B. CLEARE, Jr., Key West
Orange County.....	Hon. O. RAYMOND ELLARS, Orlando
Palm Beach Co.....	Hon. W. E. ROEBUCK, West Palm Beach
Pasco County.....	Hon. T. H. GETZEN, Dade City
Polk County.....	Hon. GUNTER STEPHENSON, Bartow
	Hon. B. G. LANGSTON, ¹ Lakeland

¹ Acted as solicitor while solicitor on military leave.

ASSISTANT COUNTY SOLICITORS

Dade County.....	Hon. JOHN C. WYNN, Miami
	Hon. WALLACE N. MAER, Miami
	Hon. EMMETT W. KEHOE, Miami
	Hon. JOHN H. BOYER, Miami
Duval County.....	Hon. J. HENRY TAYLOR, Jacksonville
	Hon. O. R. T. BOWDEN, Jacksonville
Escambia County.....	Hon. C. HOBART VILLAR, Pensacola
Hillsborough Co.....	Hon. PAUL GAME, Tampa
	Hon. CHARLES H. ROSS, Tampa
	Hon. MANUEL M. GARCIA, Tampa
Monroe County.....	None
Orange County.....	None
Palm Beach Co.....	None
Pasco County.....	None
Polk County.....	Hon. WILLIAM K. LOVE, Lakeland

COUNTY PROSECUTING ATTORNEYS

Broward County.....	Hon. W. GERRY MILLER, Ft. Lauderdale
DeSoto County.....	Hon. M. A. ROSIN, Arcadia
Gadsden County.....	Hon. WILLIAM D. DOSS, Quincy
Indian River Co.	Hon. SHERMAN N. SMITH, Jr., Vero Beach
	Hon. C. P. DIAMOND, ² Vero Beach
Jefferson County.....	Hon. JOHN H. SHUMAN, Monticello
Lee County.....	Hon. JOHN K. WOOLSLAIR, Ft. Myers
Leon County.....	Hon. WILLIAM D. HOPKINS, ² Tallahassee
	Hon. WELDON G. STARRY, ³ Tallahassee
Madison County.....	Hon. COLUMBUS B. SMITH, Madison
Manatee County.....	Hon. GEO. R. HITCHCOLK, Bradenton
Martin County.....	Hon. T. T. OUGHTERSON, Stuart
Okeechobee County.....	Hon. MARY SANDAFUR SCHULMAN, Okeechobee
Osceola County	Hon. JAY JOHNSTON, St. Cloud
Pinellas County.....	Hon. JOHN DICKINSON, Clearwater
	Hon. VICTOR O. WEHLE, ² St. Petersburg
	Hon. J. E. SATTERFIELD, ³ Clearwater
St. Lucie County.....	Hon. A. C. SIMMONS, Ft. Pierce
Sarasota County.....	Hon. LAMAR B. DOZIER, Sarasota
Seminole County.....	Hon. GEORGE A. SPEER, Jr., Sanford
Sumter County.....	Hon. JAMES W. WEST, Bushnell

¹ To be state attorney at expiration of present term.

² Acted for prosecuting attorney while on military leave; commissioned circuit judge on June 13, 1945.

³ Acted for prosecuting attorney while on military leave after June 13, 1945.

BOARDS, COMMISSIONS AND BUREAUS OF THE STATE OF FLORIDA

ACCOUNTANCY, STATE BOARD OF (See State Board of Accountancy)

ADMINISTRATION, STATE BOARD OF (See State Board of Administration)

AGRICULTURAL AND INDUSTRIAL RELIEF COMMISSION (See Florida State Improvement Commission)

AGRICULTURAL MARKETING BOARD, STATE (See State Agricultural Marketing Board)

ARCHEOLOGIST, STATE (See State Archeologist)

ARMORY BOARD

Composed of the governor, adjutant general, state quartermaster, general officers of the line and the officers who have attained the rank of colonel in the active national guard of this state (§250.48, Florida Statutes, 1941).

The powers and duties of the armory board are set out in §§250.48 and 250.49, Florida Statutes, 1941.

BARBERS' SANITARY COMMISSION

Consists of three members appointed by the governor for terms of four years (§476.17, Florida Statutes, 1941).

The general powers and duties of the commission are set out in chapter 476, Florida Statutes, 1941.

BEAUTY CULTURE, STATE BOARD OF (See State Board of Beauty Culture)

BEVERAGE DEPARTMENT, STATE (See State Beverage Department)

BLIND, FLORIDA COUNCIL FOR THE (See Florida Council for the Blind)

BOARD, ARMORY (See Armory Board)

BOARD FOR FIXING VALUES OF INVESTMENT SECURITIES OF TRUST COMPANIES

Composed of the comptroller, state treasurer and attorney general (§655.10, Florida Statutes, 1941).

The general powers and duties of the board are set out in §655.10, Florida Statutes, 1941.

BOARD FOR LICENSING LABOR BUSINESS AGENTS

Composed of governor, secretary of state and superintendent of education (§481.04, 1945 Supplement, Florida Statutes, 1941).

The general powers and duties of the said board are set out in the said section of the statutes.

BOARD FOR SUPERVISION AND REGULATION OF FORMS FOR ASSUMPTION OF RISKS BY SURETY COMPANIES

Composed of the governor, comptroller, state treasurer and attorney general (§648.16, Florida Statutes, 1941).

The general powers and duties of the board are set out in §648.16, Florida Statutes, 1941.

BOARD OF ADMINISTRATION, STATE (See State Board of Administration)

BOARD OF ARCHITECTS, FLORIDA STATE (See Florida State Board of Architects)

BOARD OF CHIROPODY EXAMINERS

Consists of three chiropodists practicing in this state and the secretary of the state board of medical examiners, who shall act as ex officio executive officer of the board. Members of the board are appointed by the governor for terms of three years (§461.05, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 461, Florida Statutes, 1941.

BOARD OF CHIROPRACTIC EXAMINERS, FLORIDA STATE (See Florida State Board of Chiropractic Examiners)**BOARD OF COMMISSIONERS OF STATE INSTITUTIONS**

Composed of the governor, secretary of state, attorney general, comptroller, state treasurer, superintendent of public instruction and commissioner of agriculture (§17, article IV, Florida Constitution).

The general powers and duties of the commissioners are set out in §17, article IV, Florida Constitution, §225.02 and chapters 135, 283, 393, 394, 409, 954, 955 and 956, Florida Statutes, 1941.

BOARD OF COMMISSIONERS OF THE POLICE OFFICERS' INSURANCE AND ANNUITY FUND

Consists of five members appointed by the governor for terms of two years (§182.03, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 182, Florida Statutes, 1941.

BOARD OF CONTROL

Consists of five citizens of this state, one from East Florida, one from South Florida, one from West Florida, one from Middle Florida, one from Middle South Florida, who have been residents of Florida for ten years, appointed by the governor for four years (§240.01, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 240, Florida Statutes, 1941.

BOARD OF DRAINAGE COMMISSIONERS

Composed of the governor, comptroller, state treasurer, attorney general and commissioner of agriculture (§298.69, Florida Statutes, 1941).

The general powers and duties of the board are set out in §§298.69-298.73, Florida Statutes, 1941.

BOARD OF EDUCATION, STATE (See State Board of Education)**BOARD OF ENGINEER EXAMINERS**

Consists of five members, appointed by the governor, for terms of four years (§471.08, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapters 471 and 472, Florida Statutes, 1941.

BOARD OF EXAMINERS IN THE BASIC SCIENCES

Consists of five members, appointed by the governor, for terms of four years (§456.07, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 456, Florida Statutes, 1941.

BOARD OF FINANCE

Consists of the governor, state treasurer and comptroller (§18.10, Florida Statutes, 1941).

The general powers and duties of the board are set out in §§18.10-18.16, Florida Statutes, 1941.

BOARD OF HEALTH, STATE (See State Board of Health)

BOARD OF MEDICAL EXAMINERS

Composed of ten practicing physicians, residents of this state, appointed by the governor for terms of four years (§§458.01 and 458.02, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 458, Florida Statutes, 1941, and 1945 Supplement, Florida Statutes, 1941.

BOARD OF OPTOMETRY, FLORIDA STATE (See Florida State Board of Optometry)**BOARD OF PARDONS**

Composed of the governor, secretary of state, attorney general, comptroller and commissioner of agriculture (§12, article IV, Florida Constitution).

The general powers and duties of the board are set out in §12, article IV, Florida Constitution.

BOARD OF PENSIONS, STATE (See State Board of Pensions)**BOARD OF PHARMACY FOR THE STATE OF FLORIDA**

Consists of five persons, pharmacists of the state, appointed by the governor for terms of four years (§465.01, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 465, Florida Statutes, 1941.

BOARD OF PHOTOGRAPHIC EXAMINERS

(Chapter 478, Florida Statutes, 1941, providing for board, held invalid and unconstitutional in *Sullivan v. De Cerb*, Fla., 23 So. 2d. 571.)

BOARD OF REVIEW, NATIONAL (See National Board of Review)**BOARD OF TRUSTEES OF TEACHERS' RETIREMENT SYSTEM**

Composed of the state board of education and two teachers appointed by the governor for terms of three years each (§238.03, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 238, Florida Statutes, 1941.

BOARD OF VETERINARY EXAMINERS

Consists of three licensed graduate veterinarians, appointed by the governor for terms of four years (§474.01, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 474, Florida Statutes, 1941.

BOARD, STATE HOUSING (See State Housing Board)**BOARD TO NAME TEACHERS FOR SUMMER SCHOOLS**

Composed of the presidents of the University of Florida and the Florida State College for Women, and of the superintendent of public instruction (§239.14, Florida Statutes, 1941).

The powers and duties of the board are set out in §239.14, Florida Statutes, 1941.

BUDGET COMMISSION, STATE (See State Budget Commission)**BUREAU, MARKETING (See Marketing Bureau)****BUREAU OF IMMIGRATION**

The bureau of immigration is under the direction and supervision of the commissioner of agriculture (§26, article IV, Florida Constitution and §19.25, Florida Statutes, 1941).

The powers and duties of the bureau of immigration are set out in §26, article IV, Florida Constitution and §§19.25-19.28, Florida Statutes, 1941.

BUREAU OF INSPECTION

The bureau of inspection is under the direction and supervision of the commissioner of agriculture (§19.47, Florida Statutes, 1941). The powers and duties of the bureau of inspection are set out in §§19.47-19.53, Florida Statutes, 1941.

BUREAU OF VITAL STATISTICS

This bureau is under the direction of the state board of health, which is composed of three members appointed by the governor for terms of four years (§§381.01 and 382.02, Florida Statutes, 1941). The general powers and duties of the bureau are set out in chapter 382, Florida Statutes, 1941, and 1945 Supplement, Florida Statutes, 1941.

CABINET, GOVERNOR'S (See Governor's Cabinet)

CHIROPODY EXAMINERS, BOARD OF (See Board of Chiropody Examiners)

CITRUS COMMISSION, FLORIDA (See Florida Citrus Commission)

COMMISSION, BARBERS' SANITARY (See Barbers' Sanitary Commission)

COMMISSION, CONSTITUTIONAL MONUMENT PARK (See Constitutional Monument Park Commission)

COMMISSION, DIRECT TAX (See Direct Tax Commission)

COMMISSION, EVERGLADES NATIONAL PARK (See Everglades National Park Commission)

COMMISSION, FLORIDA CENTENNIAL (See Florida Centennial Commission)

COMMISSION, FLORIDA STATE IMPROVEMENT (See Florida State Improvement Commission)

COMMISSION, GAME AND FRESH WATER FISH (See Game and Fresh Water Fish Commission)

COMMISSION, HOTEL (See Hotel Commission)

COMMISSION, MILK (See Milk Commission)

COMMISSION, PAROLE (See Parole Commission)

COMMISSION, SECURITIES (See Securities Commission)

COMMISSION, STATE RAILROAD (See State Railroad Commission)

COMMISSIONER, INSURANCE (See Insurance Commissioner)

COMMISSIONER OF REVENUE (Inheritance taxes)

The comptroller of the State of Florida is designated as commissioner of revenue (§198.05, Florida Statutes, 1941).

The general powers and duties of the commissioner are set out in chapter 198, Florida Statutes, 1941.

COMMISSIONERS OF STATE INSTITUTIONS, BOARD OF (See Board of Commissioners of State Institutions)

COMMISSIONERS ON UNIFORM STATE LAWS

Composed of three commissioners to be appointed by the governor for terms of four years (§11.01, Florida Statutes, 1941).

The powers, duties and qualifications of the commissioners are set out in §11.01, Florida Statutes, 1941.

COMMITTEE, TEXTBOOK RATING (See Textbook Rating Committee)

COMMITTEE FOR DEPOSITING STATE FUNDS (See Board of Finance)

COMMITTEE ON COURSES OF STUDY

Composed of nine members appointed by the state board of education upon the recommendation of the superintendent of public instruction for terms of four years (§233.01, Florida Statutes, 1941).

The powers, duties and qualifications of the committee are set out in chapter 233, Florida Statutes, 1941.

CONSERVATION, STATE BOARD OF (See State Board of Conservation)

CONSERVATION BOARD, STATE SOIL (See State Soil Conservation Board)

CONSTITUTIONAL MONUMENT PARK COMMISSION

Composed of the governor, secretary of state and one other person to be appointed by the governor, the term of office of appointee not being fixed (§265.08, Florida Statutes, 1941).

The general powers and duties of the commission are set out in §§265.08, 265.09, 265.14 and 265.15, Florida Statutes, 1941.

CONTROL, BOARD OF (See Board of Control)

COUNCIL FOR THE BLIND, FLORIDA (See Florida Council for the Blind)

COURSES OF STUDY, COMMITTEE ON (See Committee on Courses of Study)

CRIPPLED CHILDREN'S COMMISSION, FLORIDA (See Florida Crippled Children's Commission)

DADE MEMORIAL COMMISSION

Composed of three members, appointed by the governor, for terms of four years (§258.01, Florida Statutes, 1941).

The general powers and duties of the commission are set out in §§258.02-258.07, Florida Statutes, 1941.

DEFENSE COUNCIL, FLORIDA STATE (See Florida State Defense Council)

DENTAL EXAMINERS, FLORIDA STATE BOARD OF (See Florida State Board of Dental Examiners)

DEPARTMENT, STATE AUDITING (See State Auditing Department)

DEPARTMENT, STATE BEVERAGE (See State Beverage Department)

DEPARTMENT, STATE ROAD (See State Road Department)

DEPARTMENT, STATUTORY REVISION (See Statutory Revision Department)

DEPARTMENT OF PUBLIC SAFETY

Composed of the governor, secretary of state, attorney general, comptroller, state treasurer, superintendent of public instruction and commissioner of agriculture (§321.01, Florida Statutes, 1941).

The general powers and duties of the department are set out in chapters 321 and 322, Florida Statutes, 1941.

DEPOSITING STATE FUNDS, COMMITTEE FOR (See Committee for Depositing State Funds)

DIRECT TAX COMMISSION

Composed of the governor, state treasurer and comptroller (§14.12, Florida Statutes, 1941).

The general powers and duties of the commission are set out in §14.12, Florida Statutes, 1941.

DRAINAGE COMMISSIONERS, BOARD OF (See Board of Drainage Commissioners)**ECONOMIC ADVANCEMENT COUNCIL, FLORIDA (See Florida Economic Advancement Council)****EDUCATION, STATE BOARD OF (See State Board of Education)****ELECTION CANVASSERS, STATE BOARD OF (See State Board of Election Canvassers)****ENGINEER EXAMINERS, BOARD OF (See Board of Engineer Examiners)****EVERGLADES NATIONAL PARK COMMISSION**

Composed of not less than twelve and not more than thirty members to be appointed by the governor for a period of four years (§264.01, Florida Statutes, 1941).

The general powers and duties of the commission are set out in chapter 264, Florida Statutes, 1941, and §264.12, 1945 Supplement, Florida Statutes, 1941.

EXAMINERS FOR NURSES, STATE BOARD OF (See State Board of Examiners for Nurses)**EXAMINERS IN THE BASIC SCIENCES, BOARD OF (See Board of Examiners in the Basic Sciences)****FIRE MARSHAL, STATE (See State Fire Marshal)****FLORIDA AGRICULTURAL AND INDUSTRIAL RELIEF COMMISSION (Name changed to Florida State Improvement Commission.)****FLORIDA BOARD OF FORESTRY**

Consists of five members, appointed by the governor, for terms of four years (§589.01, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapters 589, 590 and 591, Florida Statutes, 1941.

FLORIDA BOARD OF MASSAGE

Composed of three members, appointed by the governor, for terms of three years. The secretary of the state board of medical examiners shall act as an ex officio member of said board (§480.04, 1945 Supplement, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 480, 1945 Supplement, Florida Statutes, 1941.

FLORIDA CENTENNIAL COMMISSION

Consists of eleven members, two from each of the present congressional districts and one from the state at large, appointed by the governor, for terms of four years. The governor and the commissioner of agriculture are, respectively, honorary chairman and honorary vice-chairman (§286.02, Florida Statutes, 1941).

The general powers and duties of the commission are set out in chapter 286, Florida Statutes, 1941.

FLORIDA CITRUS COMMISSION

Composed of eleven members, appointed by the governor for terms of two years, such members to be practical citrus fruit men, resident citizens of the State of Florida, seven members who shall be growers not connected with any packing, shipping or marketing organization (§595.01, Florida Statutes, 1941).

The general powers and duties of the commission are set out in chapters 594, 595 et seq., Florida Statutes, 1941.

FLORIDA COUNCIL FOR THE BLIND

Consists of five members, appointed by the governor, for terms of four years (§409.26, Florida Statutes, 1941).

The general powers and duties of the council are set out in §§409.26 and 409.27, Florida Statutes, 1941.

FLORIDA CRIPPLED CHILDREN'S COMMISSION

Composed of five members to be appointed by the governor for terms of four years (§391.02, Florida Statutes, 1941).

The powers, duties and qualifications of the commission are set out in chapter 391, Florida Statutes, 1941.

FLORIDA DRY CLEANING AND LAUNDRY BOARD (Law creating said board repealed in 1943.)**FLORIDA ECONOMIC ADVANCEMENT COUNCIL**

Composed of the governor, secretary of state, commissioner of agriculture and attorney general (§120.01, 1945 Supplement, Florida Statutes, 1941).

The general powers and duties of the council are set out in chapter 120, 1945 Supplement, Florida Statutes, 1941.

FLORIDA INDUSTRIAL COMMISSION

Consists of three members, appointed by the governor, for terms of four years (§440.44, Florida Statutes, 1941).

The general powers and duties of the commission are set out in chapters 440 and 443, Florida Statutes, 1941.

FLORIDA MILK BOARD (See Milk Commission)**FLORIDA REAL ESTATE COMMISSION**

Consists of three persons, resident citizens of Florida, to be appointed by the governor for terms of three years (§475.02, Florida Statutes, 1941).

The general powers and duties of the commission are set out in chapter 475, Florida Statutes, 1941.

FLORIDA STATE BOARD OF ARCHITECTS

Composed of five members who are architects, appointed by the governor for terms of four years (§467.01, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 467, Florida Statutes, 1941.

FLORIDA STATE BOARD OF CHIROPRACTIC EXAMINERS

Composed of three members to be appointed by the governor for terms of three years, and who shall be doctors of chiropractic, and who shall be bona fide residents of this state (§§460.01 and 460.02, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 460, Florida Statutes, 1941.

FLORIDA STATE BOARD OF DENTAL EXAMINERS

Composed of five members, appointed by the governor for terms of four years (§466.06, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 466, Florida Statutes, 1941.

FLORIDA STATE BOARD OF OPTOMETRY

Composed of five optometrists, residents of this state, appointed by the governor, for terms of four years (§463.02, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 463, Florida Statutes, 1941, and 1945 Supplement, Florida Statutes, 1941.

FLORIDA STATE DEFENSE COUNCIL

Composed of the governor, as chairman, the attorney general and adjutant general, as ex officio members, and other members (number not designated) to be appointed by the governor for terms not exceeding four years each, one of whom is designated by the governor as vice-chairman (§249.03, Florida Statutes, 1941).

The governor is given power, whenever he deems it expedient, by proclamation, to dissolve, suspend or reestablish the defense council (§249.01, Florida Statutes, 1941).

The powers, duties and qualifications of the members of the council are set out in chapter 249, Florida Statutes, 1941.

FLORIDA STATE IMPROVEMENT COMMISSION

Composed of five members, one of whom shall be the governor, one of whom shall be the chairman of the state road department, the three other members to be appointed by the governor for terms of four years (§420.02, Florida Statutes, 1941).

The general powers and duties of the commission are set out in chapter 420, Florida Statutes, 1941.

Formerly the Agricultural and Industrial Relief Commission.

FORESTRY, FLORIDA BOARD OF (See Florida Board of Forestry)**FUNERAL DIRECTORS AND EMBALMERS, STATE BOARD OF** (See State Board of Funeral Directors and Embalmers)**GAME AND FRESH WATER FISH COMMISSION**

Consists of five members appointed by the governor for terms of five years (§30, article IV, Florida Constitution).

The general powers and duties of the commission are set out in the above section of the constitution and chapter 372, Florida Statutes, 1941, and the same chapter in the 1945 Supplement, Florida Statutes, 1941.

GOVERNOR'S CABINET

Composed of the governor, secretary of state, attorney general, comptroller, state treasurer, superintendent of public instruction and commissioner of agriculture (§20, article IV, Florida Constitution).

The general powers and duties of the governor's cabinet are set out in §20, article IV, Florida Constitution.

HOTEL COMMISSION

Consists of a commissioner, appointed by the governor, whose term of office runs concurrently with that of governor (§509.02, Florida Statutes, 1941).

The general powers and duties of the commission are set out in chapters 509, 510 and 511, Florida Statutes, 1941.

IMMIGRATION, BUREAU OF (See Bureau of Immigration)**INDUSTRIAL COMMISSION, FLORIDA** (See Florida Industrial Commission)**INSPECTION, BUREAU OF** (See Bureau of Inspection)**INSURANCE COMMISSIONER**

The state treasurer is designated as insurance commissioner (§626.01, Florida Statutes, 1941).

The general powers and duties of the insurance commissioner are set out in chapters 625, 626 et seq., Florida Statutes, 1941.

INTERNAL IMPROVEMENT FUND, TRUSTEES OF THE (See Trustees of the Internal Improvement Fund)**INVESTMENT SECURITIES OF TRUST COMPANIES, BOARD FOR FIXING VALUES OF** (See Board for Fixing Values of Investment Securities of Trust Companies)

JUDAH P. BENJAMIN MEMORIAL COMMISSION

Composed of three citizens of the state appointed by the governor, terms of office not stated (§265.10, Florida Statutes, 1941).

The general powers and duties of the commission are set out in §§265.10-265.12, Florida Statutes, 1941.

LABOR BUSINESS AGENTS, BOARD FOR LICENSING (See Board for Licensing Labor Business Agents)

LAW EXAMINERS, STATE BOARD OF (See State Board of Law Examiners)

LIBRARY BOARD, STATE (See State Library Board)

LIVE STOCK SANITARY BOARD, STATE (See State Live Stock Sanitary Board)

MARKETING BOARD, STATE AGRICULTURAL (See State Agricultural Marketing Board)

MARKETING BUREAU

Consists of a state marketing commissioner, appointed by the governor, upon recommendation of the commissioner of agriculture, for a term of two years (§603.01, Florida Statutes, 1941).

The general powers and duties of the bureau are set out in §603.09, Florida Statutes, 1941.

MASSAGE, FLORIDA BOARD OF (See Florida Board of Massage)

MEDICAL EXAMINERS, BOARD OF (See Board of Medical Examiners)

MEMORIAL COMMISSION, DADE (See Dade Memorial Commission)

MEMORIAL COMMISSION, JUDAH P. BENJAMIN (See Judah P. Benjamin Memorial Commission)

MEMORIAL COMMISSION, STEPHEN FOSTER (See Stephen Foster Memorial Commission)

MEMORIAL, SPANISH WAR (See Spanish War Memorial)

MILK COMMISSION

Consists of milk administrator, appointed by the governor for a term of four years, state health officer, a citizen not connected with the milk industry and three members of the milk industry; one a producer, one a distributor and one a producer-distributor appointed by the governor for terms of four years (§501.03, Florida Statutes, 1941). The general powers and duties of the commission are set out in chapter 501, Florida Statutes, 1941.

MOTOR VEHICLE COMMISSIONER, STATE (See State Motor Vehicle Commissioner)

NATIONAL BOARD OF REVIEW

Governor may appoint three persons to be members of the national board of review (§521.01, Florida Statutes, 1941).

The national board of review is charged with the examination and approval of motion picture film.

NATUROPATHIC EXAMINERS, STATE BOARD OF (See State Board of Naturopathic Examiners)

NAVAL STORES, SUPERVISORY INSPECTOR OF (See Supervisory Inspector of Naval Stores)

OFFICE, PUBLIC LAND (See Public Land Office)

OSTEOPATHIC MEDICAL EXAMINERS, STATE BOARD OF (See State Board of Osteopathic Medical Examiners)

PARDONS, BOARD OF (See Board of Pardons)

PAROLE COMMISSION

Consists of three citizens and residents of this state, appointed by the board of commissioners of state institutions, certified by said board to the senate for confirmation. The members of the commission are appointed for terms of six years (§§947.02 and 947.03, Florida Statutes, 1941; §32, article XVI, Florida Constitution).

The general powers and duties of the commission are set out in chapters 947 and 948, Florida Statutes, 1941, and 1945 Supplement, Florida Statutes, 1941; §32, article XVI, Florida Constitution.

PENSIONS, STATE BOARD OF (See State Board of Pensions)

PHARMACY, BOARD OF, FOR THE STATE OF FLORIDA (See Board of Pharmacy for the State of Florida)

PHOTOGRAPHIC EXAMINERS, BOARD OF (See Board of Photographic Examiners)

PLANNING BOARD, STATE (See State Planning Board)

PLANT BOARD, STATE (See State Plant Board)

POLICE OFFICERS' INSURANCE AND ANNUITY FUND, BOARD OF COMMISSIONERS OF THE (See Board of Commissioners of the Police Officers' Insurance and Annuity Fund)

PUBLIC LAND OFFICE

The public land office is under the direction and supervision of the commissioner of agriculture (§26, article IV, Florida Constitution, and §19.13, Florida Statutes, 1941).

The powers and duties of this office are set out in §§19.13-19.24, Florida Statutes, 1941, and §26, article IV, Florida Constitution.

PUBLIC SAFETY, DEPARTMENT OF (See Department of Public Safety)

PUBLIC WELFARE, STATE BOARD OF (See State Board of Public Welfare)

RACING COMMISSION, STATE (See State Racing Commission)

RAILROAD ASSESSMENT BOARD

Composed of the comptroller, state treasurer and attorney general (§195.01, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 195, Florida Statutes, 1941.

RAILROAD COMMISSION, STATE (See State Railroad Commission)

REAL ESTATE COMMISSION, FLORIDA (See Florida Real Estate Commission)

RELIEF COMMISSION, AGRICULTURAL AND INDUSTRIAL (See Agricultural and Industrial Relief Commission)

RETIREMENT SYSTEM, BOARD OF TRUSTEES OF TEACHERS' (See Board of Trustees of Teachers' Retirement System)

REVENUE, COMMISSIONER OF (See Commissioner of Revenue)

SECURITIES COMMISSION

Composed of the comptroller, state treasurer and attorney general (§517.03, Florida Statutes, 1941).
The general powers and duties of the commission are set out in chapter 517, Florida Statutes, 1941.

SERVICE OFFICER, STATE (See State Service Officer)

SOCIAL WELFARE (See State Welfare Board)

SPANISH WAR MEMORIAL

The Spanish war memorial is under the supervision of the commissioners of state institutions (§265.17, Florida Statutes, 1941).
The general powers and duties are set out in §§265.17-265.22, Florida Statutes, 1941.

STATE AGRICULTURAL MARKETING BOARD

Composed of the governor, commissioner of agriculture and the state marketing commissioner (§603.16, Florida Statutes, 1941). The state marketing commissioner is appointed by the governor, upon the recommendation of the commissioner of agriculture, for terms of two years (§603.01, Florida Statutes, 1941).
The general powers and duties of the board are set out in §§603.16-603.18, Florida Statutes, 1941.

STATE ARCHEOLOGIST

Appointed by the governor (term of office not given) (§376.01, Florida Statutes, 1941).
The general powers and duties of the state archeologist are set out in chapter 376, Florida Statutes, 1941.

STATE AUDITING DEPARTMENT

Composed of a state auditor and ten assistant state auditors to be appointed by the governor for terms of four years, unless sooner removed by the governor (§21.02, Florida Statutes, 1941).
The powers, duties and qualifications of the state auditor and assistant state auditors are set out in chapter 21, Florida Statutes, 1941.

STATE BEVERAGE DEPARTMENT

The principal officer of the department shall be the director, appointed by the governor for a term of four years (§561.05, Florida Statutes, 1941).
The general powers and duties of the department are set out in chapter 561, Florida Statutes, 1941.

STATE BOARD OF ACCOUNTANCY

Consists of five persons, each of whom shall be a resident of this state, and shall hold a certificate as a certified public accountant, appointed by the governor for terms of four years (§473.03, Florida Statutes, 1941).
The general powers and duties of the board are set out in chapter 473, Florida Statutes, 1941.

STATE BOARD OF ADMINISTRATION

Composed of the governor, state treasurer and comptroller (§16, article IX, Florida Constitution).
The general powers and duties of the board are set out in §16, article IX, Florida Constitution; §§344.12-344.26, Florida Statutes, 1941, and 1945 Supplement, Florida Statutes, 1941.

STATE BOARD OF ARCHITECTS, FLORIDA (See Florida State Board of Architects)

STATE BOARD OF BEAUTY CULTURE

Consists of three members appointed by the governor for terms of three years. Two members of said board shall be women (§477.18, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 477, 1945 Supplement, Florida Statutes, 1941.

STATE BOARD OF CHIROPODY EXAMINERS (See Board of Chiropractic Examiners)**STATE BOARD OF CHIROPRACTIC EXAMINERS, FLORIDA (See Florida State Board of Chiropractic Examiners)****STATE BOARD OF CONSERVATION**

Composed of the governor, secretary of state, attorney general, comptroller, state treasurer, commissioner of agriculture and superintendent of public instruction (§373.01, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapters 373-375, Florida Statutes, 1941, and chapter 377, 1945 Supplement, Florida Statutes, 1941.

STATE BOARD OF CONTROL (See Board of Control)**STATE BOARD OF DENTAL EXAMINERS, FLORIDA (See Florida State Board of Dental Examiners)****STATE BOARD OF EDUCATION**

Composed of the governor, secretary of state, attorney general, state treasurer and superintendent of public instruction (§3, article XII, Florida Constitution).

The general powers and duties of the board are set out in §3, article XII, Florida Constitution and §§229.07 and 229.08, Florida Statutes, 1941.

STATE BOARD OF ELECTION CANVASSERS

Composed of the secretary of state, comptroller and attorney general (§99.49, Florida Statutes, 1941).

The general powers and duties of the board are set out in §§99.49-99.51 and 102.47 and 102.48, Florida Statutes, 1941.

STATE BOARD OF ENGINEER EXAMINERS (See Board of Engineer Examiners)**STATE BOARD OF EXAMINERS FOR NURSES**

Consists of five nurses, residents of this state, appointed by the governor for terms of four years (§464.01, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 464, Florida Statutes, 1941.

STATE BOARD OF EXAMINERS IN OPTOMETRY (See Florida State Board of Optometry)**STATE BOARD OF FUNERAL DIRECTORS AND EMBALMERS**

Consists of the state health officer and four other members to be appointed by the governor for terms of four years (§470.02, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 470, Florida Statutes, 1941.

STATE BOARD OF HEALTH

Composed of three members to be appointed by the governor for terms of four years (§§381.01 and 381.02, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 381, Florida Statutes, 1941.

STATE BOARD OF LAW EXAMINERS

Composed of nine members appointed by the governor, two from each congressional district as they existed on July 1, 1925, and one from the state at large, for terms of three years (§39.04, Florida Statutes, 1941).

The powers, duties and qualifications of the board are set out in chapter 39, Florida Statutes, 1941 and the 1945 Supplement, Florida Statutes, 1941.

STATE BOARD OF MEDICAL EXAMINERS (See Board of Medical Examiners)**STATE BOARD OF NATUROPATHIC EXAMINERS**

Composed of three practicing naturopathic physicians, residents of this state, appointed by the governor for terms of four years (§462.02, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 462, Florida Statutes, 1941, and 1945 Supplement, Florida Statutes, 1941.

STATE BOARD OF OSTEOPATHIC MEDICAL EXAMINERS

Consists of six regularly licensed osteopathic physicians, appointed by the governor, for terms of three years (§459.05, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 459, Florida Statutes, 1941.

STATE BOARD OF PENSIONS

Composed of the governor, comptroller and state treasurer (§291.01, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 291, Florida Statutes, 1941.

STATE BOARD OF PHARMACY (See Board of Pharmacy for the State of Florida)**STATE BOARD OF PUBLIC WELFARE**

Composed of seven members to be appointed by the governor for terms of four years (§409.01, Florida Statutes, 1941).

The powers, duties and qualifications of the board are set out in chapters 409, 412 and 413, Florida Statutes, 1941.

STATE BOARD OF VETERINARY EXAMINERS (See Board of Veterinary Examiners)**STATE BOARD OF VOCATIONAL EDUCATION**

Composed of the governor, secretary of state, state treasurer, attorney general and superintendent of public instruction (§229.08, Florida Statutes, 1941).

The general powers and duties of the board are set out in §229.08, Florida Statutes, 1941.

STATE BUDGET COMMISSION

Composed of the governor, secretary of state, attorney general, comptroller, state treasurer, commissioner of agriculture and state superintendent of public instruction (§216.01, Florida Statutes, 1941).

The general powers and duties of the commission are set out in chapter 216, Florida Statutes, 1941, and §192.51, 1945 Supplement, Florida Statutes, 1941.

STATE FIRE MARSHAL

The state treasurer is ex officio state fire marshal (§633.01, Florida Statutes, 1941).

The general powers and duties of the state fire marshal are set out in chapter 633, 1945 Supplement, Florida Statutes, 1941.

STATE HOUSING BOARD

Composed of the governor, comptroller, state treasurer, attorney general and commissioner of agriculture (§424.04, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 424, Florida Statutes, 1941.

STATE LIBRARY BOARD

Composed of three members appointed by the governor for terms of four years (§§257.01 and 257.02, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 257, Florida Statutes, 1941.

STATE LIVE STOCK SANITARY BOARD

Composed of seven practical livestock men, residents of the state, appointed by the governor for terms of four years (§585.02, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 585, Florida Statutes, 1941.

STATE MOTOR VEHICLE COMMISSIONER

Appointed by the governor for a term of four years (§318.01, Florida Statutes, 1941).

The general powers and duties of the commissioner are set out in chapter 318, Florida Statutes, 1941.

STATE PAROLE COMMISSION (See Parole Commission)**STATE PLANNING BOARD**

Composed of the secretary of state, the chairman of the state road department and three members, to be appointed by the governor, for terms of four years each (§419.01, Florida Statutes, 1941).

The powers and duties, and the qualifications of the three members of the board to be appointed by the governor, are set out in §§419.02-419.12, Florida Statutes, 1941.

STATE PLANT BOARD

Consists of five citizens of this state, one from East Florida, one from South Florida, one from West Florida, one from Middle Florida and one from Middle South Florida, appointed by the governor for terms of four years (§581.01, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 581, Florida Statutes, 1941.

STATE RACING COMMISSION

Consists of five members appointed by the governor for terms of two years (§550.01, Florida Statutes, 1941).

The general powers and duties of the commission are set out in chapters 550 and 551, Florida Statutes, 1941.

STATE RAILROAD COMMISSION

Consists of three commissioners, elected by the qualified electors of the state, for terms of four years (§350.01, Florida Statutes, 1941).

The general powers and duties of the commission are set out in §35, article V, Florida Constitution; chapters 323, 347, 350, 352, 360, 364, and §116.19, Florida Statutes, 1941.

STATE ROAD DEPARTMENT

Consists of five members appointed by the governor for terms of four years (§341.01, Florida Statutes, 1941).

The general powers and duties of the department are set out in chapters 317, 331, 341, 379, §§208.09, 350.75, 952.16-952.21, Florida Statutes, 1941.

STATE SERVICE OFFICER

Appointed by the governor for a term of four years (§292.02, Florida Statutes, 1941).

The general powers and duties of the state service officer are set out in chapter 292, Florida Statutes, 1941.

STATE SOIL CONSERVATION BOARD

Consists of five citizens of this state, one from East Florida, one from South Florida, one from West Florida, one from Middle Florida and one from Middle South Florida, appointed by the governor for terms of four years (§582.06, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 582, Florida Statutes, 1941.

STATE TEXTBOOK PURCHASING BOARD

Composed of the governor, secretary of state, attorney general, comptroller, state treasurer, superintendent of public instruction and commissioner of agriculture (§233.13, Florida Statutes, 1941).

The powers and duties of the board are set out in §§233.13 and 233.26, Florida Statutes, 1941).

STATE TUBERCULOSIS BOARD

Composed of three members to be appointed by the governor for terms of four years (§392.01, Florida Statutes, 1941).

The powers, duties and qualifications of the board are set out in §§392.02-392.14, Florida Statutes, 1941.

STATUTORY REVISION DEPARTMENT

This department is under the supervision and direction of the attorney general (§16.43, 1945 Supplement, Florida Statutes, 1941).

The powers and duties of the department are set out in §§16.44-16.51, 1945 Supplement, Florida Statutes, 1941.

STEPHEN FOSTER MEMORIAL COMMISSION

Composed of five members, citizens and residents of the state, appointed by the governor, for terms of four years (§265.13, Florida Statutes, 1941).

The general powers and duties of the commission are set out in §§265.13-265.16, Florida Statutes, 1941.

SUMMER SCHOOLS, BOARD TO NAME TEACHERS FOR (See Board to Name Teachers for Summer Schools)**SUPERVISING INSPECTOR OF NAVAL STORES**

The supervising inspector and inspectors of naval stores are appointed by the governor, no term of office being stated (§523.08, Florida Statutes, 1941).

The general powers and duties of the inspector are set out in chapter 523, Florida Statutes, 1941.

SUPERVISION AND REGULATION OF FORMS FOR ASSUMPTION OF RISKS BY SURETY COMPANIES, BOARD FOR (See Board for Supervision and Regulation of Forms for Assumption of Risks by Surety Companies)**SUPREME COURT BUILDING COMMISSION**

Consists of the governor, comptroller, attorney general, a justice of the supreme court and three citizens to be appointed by the governor (§255.06, Florida Statutes, 1941).

Powers and duties of this commission are set out in §§255.06-255.11-3, Florida Statutes, 1941, and 1945 Supplement, Florida Statutes, 1941.

TEACHERS FOR SUMMER SCHOOLS, BOARD TO NAME (See Board to Name Teachers for Summer Schools)

TEXTBOOK PURCHASING BOARD, STATE (See State Textbook Purchasing Board)

TEXTBOOK RATING COMMITTEE

Composed of seven members appointed by the state board of education, upon the recommendation of the superintendent of public instruction, and of the superintendent of public instruction and members of his department designated by him (§233.07, Florida Statutes, 1941).

The powers, duties and qualifications of the committee are set out in §§233.07-233.11 et seq., Florida Statutes, 1941.

THE POLICE OFFICERS' INSURANCE AND ANNUITY FUND, BOARD OF COMMISSIONERS OF (See Board of Commissioners of the Police Officers' Insurance and Annuity Fund)

TRUSTEES OF TEACHERS' RETIREMENT SYSTEM, BOARD OF (See Board of Trustees of Teachers' Retirement System)

TRUSTEES OF THE INTERNAL IMPROVEMENT FUND

Composed of the governor, comptroller, state treasurer, attorney general and commissioner of agriculture (§253.02, Florida Statutes, 1941).

The general powers and duties of the trustees are set out in chapters 253 and 270 and §§192.38-192.50, 285.02 and 331.05, Florida Statutes, 1941, and other laws.

TUBERCULOSIS BOARD, STATE (See State Tuberculosis Board)

UNIFORM STATE LAWS, COMMISSIONERS ON (See Commissioners on Uniform State Laws)

VETERINARY EXAMINERS, BOARD OF (See Board of Veterinary Examiners)

VITAL STATISTICS, BUREAU OF (See Bureau of Vital Statistics)

VOCATIONAL EDUCATION, STATE BOARD OF (See State Board of Vocational Education)

CHAPTER I

CONSTRUCTION OF STATUTES

WARTIME EMERGENCY LAWS

August 27, 1945.—045-266.

TERMINATION—TIME FOR

QUESTION: Is the termination of the wartime emergency laws of Florida dependent upon the termination of the war, the cessation of hostilities or the war's duration?

To Honorable Frank Bane, Council of State Governments, Washington, D. C.:

The provisions of the statutes and laws of this state upon this question are not uniform. Taken at random from the statutes, we find the following several provisions upon this question:

1. "During the period of the present war and six months thereafter" (Section 39.06, Florida Statutes, 1941).
2. "During the existence of the present war" (Sections 101.11-101.19, Florida Statutes, 1941).
3. "During the existing war and six months" thereafter (Sections 249.24-249.30, Florida Statutes, 1941).
4. "Whenever a state of war shall exist or be imminent" (Section 250.74, Florida Statutes, 1941).
5. "During such time as a state of war exists" (Sections 249.31-249.37, Florida Statutes, 1941).
6. During "an impending war or state of war" (Section 250.73, Florida Statutes, 1941).
7. "Whenever the United States is at war" (Sections 779.06-779.20, Florida Statutes, 1941).
8. "During time of war or national emergency" (Section 481.08, Florida Statutes, 1941).
9. "During the war emergency" (Section 234.13, Florida Statutes, 1941).
10. Until "one year after the present hostilities cease" (Section 192.55, Florida Statutes, 1941).
11. Until the "cessation of active hostilities" (Section 562.14, Florida Statutes, 1941).

Numbers 1 to 8, above mentioned, in substance seem to relate to the period of the war or during its existence; number 9 to the period of the war emergency; and numbers 10 and 11 to the period of hostilities. These periods of time may differ.

In the case of *Hamilton v. Kentucky Distilleries and Warehouse Company*, 251 U. S. 146, text 165, 40 S. Ct. 106, 64 L. ed. 194, text 203, the court said that "In the absence of specific provisions to the contrary the period of war has been held to extend to the ratification of the Treaty of Peace or the proclamation of peace. *J. Ribasy Hijo v. United States*, 194 U. S. 315, 323, 48 L. ed. 994, 996, 24 Sup. Ct. Rep. 727; *The Protector*, 12 Wall, 700, 702, 20 L. ed. 463, 464; *United States v. Anderson*, 9 Wall, 56, 70, 19 L. ed. 615, 619."

One or more of our statutes is operative "during the war emergency." This seems to differ from those operative during the period of war. An "emergency" has been said to be a condition resulting in social disturbances or distress (*Black's Law Dictionary*; 20 C. J. 499). The legislature, when it used the above phrase, doubtless intended to fix a period of time other than the period of the war. The legislature is presumed to understand the meaning of words and to have expressed its intent thereby (*Van Pelt v. Hilliard*, 75 Fla. 792, 78 So. 693). Statutes of this nature would seem to terminate just as soon as the emergency caused by the war condition ends, whether when the treaty of peace is signed or otherwise.

Other statutes are operative during the active hostilities or during the period of hostilities. These likewise seem to differ from those operative during the period of war. The word "hostility", in the law of nations, relates to a state of open war (41 C.J.S. 361; *Kent. Comm.* 56, 60; *Black's Law Dictionary*; *Webster's New International Dictionary*;) or an actual operation in the conduct of war (*Queen Insurance Company vs. Globe and Rutgers Fire Insurance Company*, (C.C.A. N.Y.) 282 Fed. 976, text 979). Statutes of this nature would seem to terminate just as soon as the state of open war comes to an end and are not dependent on the signing of a treaty of peace.

CHAPTER II

STATE ORGANIZATION

ADMISSION INTO UNION; STATE BOUNDARIES

October 18, 1946.—046-442.

CONCURRENT JURISDICTION—MILITARY PERSONNEL

QUESTION: What is the amount of jurisdiction that is retained or exercised by the State of Florida over personnel stationed at and for offenses committed on military bases in the State of Florida and in particular as to those bases where:

1. The base is situated on property which was reserved by the federal government in the original grant to the state?
2. Where the base is situated on property, the title in fee having been conveyed to the federal government by the state or by private individuals prior to or following the passage of the State Ceding Act?
3. Where the base is situated on property held by the Federal Government under a leasehold acquired from the state or from individuals?

To Lt. Col. John E. Blackstone, Staff Judge Advocate, Headquarters
Fifteenth Air Force, Colorado Springs, Colorado:

I do not know of any method or manner of United States Government acquiring **exclusive** jurisdiction over lands in this state except under the provisions of Article I, Section 8, Clause 17 of the United States Constitution (*Chappell v. United States*, 160 U. S. 499). When lands are acquired in keeping with the said constitutional provision the federal jurisdiction is exclusive of all state authority (18 U. S. C. A. 451, *United States v. Unzueta*, 281 U. S. 138). Although the Federal Government may exercise exclusive jurisdiction over a territory, this does not mean that the State of Florida cannot serve her civil and criminal process thereon as the courts have held that the reservation, as the Florida statutes provide, is not interfering in any respect with the supremacy of the United States over such territory but is to prevent such territories from being a refuge for fugitives from justice (*Ft. Levenworth Railroad Company v. Lowe*, 114 U. S. 525). The Florida statutes provide:

"Section 6.02.—**United States authorized to acquire lands for certain purposes.**—The United States may purchase, acquire, hold, own, occupy and possess such lands within the limits of this state as they shall seek to occupy and hold as sites on which to erect and maintain forts, magazines, arsenals, dockyards, and other needful buildings, or any of them, as contemplated and provided in the constitution of the United States; such land to be acquired either by contract with owners, or in the manner hereinafter provided."

"Section 6.04.—**Jurisdiction over such lands, how ceded to the United States.**—Whenever the United States shall contract for, purchase or acquire any land within the limits of this state for the purposes aforesaid, in either of the modes above mentioned and provided, or shall hold for such purposes lands heretofore

lawfully acquired or reserved therefor, and shall desire to acquire constitutional jurisdiction over such lands for said purposes, the governor of this state may, upon application made to him in writing on behalf of the United States for that purpose, accompanied by the proper evidence of said reservation, purchase, contract or acquisition of record, describing the land sought to be ceded by convenient metes and bounds, thereupon, in the name and on behalf of this state, cede to the United States exclusive jurisdiction over the land so reserved, purchased or acquired and sought to be ceded; the United States to hold, use, occupy, own, possess and exercise said jurisdiction over the same for the purposes aforesaid, and none other whatsoever; provided, always, that the consent aforesaid is hereby given and the cession aforesaid is to be granted and made as aforesaid, upon the express condition that this state shall retain a concurrent jurisdiction with the United States in and over the land or lands so to be ceded, and every portion thereof, so far that all process, civil or criminal issuing under authority of this state, or of any of the courts or judicial officers thereof may be executed by the proper officers thereof, upon any person amenable to the same, within the limits and extent of lands so ceded, in like manner and to like effect as if this law had never been passed; saving, however, to the United States security to their property within said limits and extent, and exemption of the same, and of said lands from any taxation under the authority of this state while the same shall continue to be owned, held, used and occupied by the United States for the purposes above expressed and intended, and not otherwise."

You will observe that in the constitutional provision the phrase "places purchased" limits the Federal Government to the **one mode of acquiring** exclusive legislative authority over lands with the state's consent. When such lands are acquired in any other way the state is not deprived of her jurisdiction and may continue to legislate and enforce laws pertaining to such territory, provided such legislation does not interfere with the right of eminent domain (*Chicago R. I. & P. R. Co. v. McGlinn*, 114, U. S. 545; *Palmer v. Barrett*, 164 U. S. 399; *Chappell v. United States*, supra).

Briefly summarizing the law, therefore, in my opinion:

1. The State of Florida has jurisdiction to serve her civil and criminal process upon any military base even though it be under the exclusive jurisdiction of the Federal Government.
2. If a crime is committed on a territory over which United States has exclusive jurisdiction, the courts of this state would be without jurisdiction to try and punish the offender.
3. If the offense is committed on a territory **not** under the exclusive jurisdiction of United States Government, the State of Florida has concurrent jurisdiction to try and punish the offender unless the exercise of its jurisdiction would interfere with the right of eminent domain exercised by the Federal Government.

I believe I can appreciate your position and feelings when you state "After spending 38 months overseas * * * it is not the easiest thing for me to get back into proper channels of thinking where there may be a conflict of law * * * and, therefore, perhaps, it would not be amiss to remind you of the Assimilative Crime Statute as it may have a bearing on the many problems which undoubtedly confront you. As you will recall, the Assimilative Crime Statute was first enacted in 1825 and has been reenacted at subsequent intervals, June 6, 1940, being the last reenactment to my knowledge. I refer you to the following cases bearing on such statute, to wit: *Franklin v. United States*, 216 U. S. 559, 54 L. ed. 615, *United States v. Press Publishing Company*, 219 U. S. 1, 55 L. ed. 65.

CHAPTER III

LEGISLATIVE DEPARTMENT

SENATE AND HOUSE OF REPRESENTATIVES

July 16, 1945.—045-185.

REAPPORTIONMENT—MEMBERS—TERMS

QUESTION: 1. Is the decision of *Brown v. Saunders*, 166 S. E. (Va.) 105 under our constitutional provisions, applicable to the reapportionment question in Florida?

2. Would the hold-over senators legally hold their offices and represent the districts as they are now apportioned according to law?

3. If the the answer to question 2 is in the affirmative, would the people in these hold-over senators' districts be entitled to vote in a state-wide election for the other senators?

To Honorable Neil C. McMullen, State Representative, Tampa, Florida:

The first question must be answered in the negative which will in effect dispose of the second and third questions for they are based on the premise that the first would be answered in the affirmative.

The case of *Brown v. Saunders* involved the validity of a 1932 Act of the General Assembly of Virginia attempting to divide the state into nine congressional districts. Virginia's congressional representation had been reduced from ten to nine members by the acts of Congress and the 1930 Federal Census. The court held that the nine districts sought to be created by the general assembly were so grossly unequal in population as to render the act invalid, so Virginia's nine congressmen must be elected from the state at large. However, this effect of the invalidity of the redistricting act had no relation to the constitution or laws of Virginia but was in accordance with the federal statutes on the subject, so has no application to reapportionment of a state legislature.

A situation similar to that presented by the *Brown* case was before the United States Supreme Court in *Smiley v. Holm*, 76 L. Ed. 795. It involved the validity of a congressional redistricting act of Minnesota and the result of the invalidity of that act upon the method of electing representatives to Congress. Here, as in Virginia, the number of representatives was reduced from ten to nine and the act of the state legislature attempting to create nine districts was declared invalid. No state law on the subject remained in force, for the former law, of course, provided for ten districts. In construing the Federal Apportionment Acts of 1911 and 1929, the Court said:

"Where, as in the case of Minnesota, the number of representatives has been decreased, there is a different situation as existing districts are not at all adapted to the new apportionment. It follows that in such a case, unless and until new districts are created, all representatives allotted to the state must be elected by the state at large. That would be required, in the absence of a redistricting act, in order to afford the representation to which the State is constitutionally entitled, and the general provisions of the act of 1911 cannot be regarded as intended to have a different import." (Emphasis supplied).

An altogether different situation exists where the apportionment of a state legislature is concerned, and I can find no reason or authority for holding that, under the present provisions of the Constitution of Florida, state senators could under any circumstances be elected from the state at large.

In the following discussion I shall treat together the effect of the failure of the legislature to perform its constitutional duty as to reapportionment and the effect of its enacting an invalid reapportionment law. There is actually no difference, for the passage of an invalid law is, in effect, a failure to act.

It is well settled that where the legislature fails to act in the matter of apportionment as required by the constitution, the last valid apportionment act remains in force and the courts will not interfere to compel the legislature to perform its mandatory constitutional duty. In *Fergus v. Marks, et al*, 152 N. E. (Ill.) 557, the Court said:

"... the duty to reapportion the state is a specific legislative duty imposed by the constitution solely upon the legislative department of the state, and it alone is responsible to the people for failure to perform that duty."

Although the broad discretionary powers of the legislature in such matters are recognized, it is well settled that the courts will consider and declare unconstitutional apportionment acts that are grossly inequitable because of inequalities in the population of districts. Where this is done the last preceding valid apportionment law will remain in effect.

The case of *Stiglitz v. Schardien*, 40 S. W. (2d) (Ky.) 315, involved the Apportionment Act of 1930 which was virtually the same as the Act of 1918, which was the last preceding law on the subject. The Kentucky Constitution required reapportionment every ten years. The court held the 1930 act to be unconstitutional and that the 1918 law remained in effect. In declaring the 1930 act void, the Court said:

"The districts defined by the act of 1930 could not be justified upon the ground that they followed the act of 1918 in all districts outside of Jefferson county. Such a re-enactment was not a decennial redistricting according to population and area as contemplated by the constitution. The 1918 act had to be tested according to the census of 1910, upon which it was based, while the act of 1930 must be measured by the census of 1920."

And in respect to the 1918 law, the court further remarked:

"The act of 1918, which remains in force until a new constitutional redistricting act is passed, was based upon the federal census of 1910. The validity of that redistricting was not questioned, and may not be questioned at this late day."

The cases cited herein are illustrative of many other decisions and relate to the apportionment of one or both houses of a state legislature under mandatory constitutional provisions requiring periodic apportionment, but in none of them is there the faintest suggestion that because of the failure of the legislature to act or the enactment by it of an invalid apportionment statute, the state representatives or senators should be elected from the state at large. Therefore, it is my opinion that under the Florida Constitution and under similar circumstances the present apportionment law should be controlling and the state senators would continue to be elected from the districts as now constituted.

The foregoing, of course, is based upon the present constitutional provisions and laws and in answer to your specific questions, and the matters discussed herein and the opinion expressed by me does not consider a contemplation of amending the present constitutional provisions relating to reapportionment.

June 7, 1945.—045-352.

REPRESENTATION—REAPPORTIONMENT

QUESTION: 1. Is House Bill No. 1 a proper approach to reapportionment by the 1945 Legislature as required by Section 3, Article VII of the Constitution?

2. House Bill No. 3, introduced in the pending Extraordinary Session attempts to legislate a reapportionment exactly in accord with the present membership of the house of representatives and appears to be predicated upon the state census of 1935, ignoring the 1945 census in the process of completion, and also ignoring the 1940 federal census. Is this constitutionally proper reapportionment?

3. May the house of representatives receive or permit the introduction of a proposed constitutional amendment in effecting the reapportionment required under the Constitution?

To Honorable S. Henry Harris, Chairman, Subcommittee of Legal Advisors for the House of Representatives acting as a Committee of the Whole:

1. In answering this question I am not going to limit myself to Article VII, Section 3, of the Constitution, but, of course, will deal with the question as one to be answered under the governing law of Florida. In my opinion, House Bill No. 1 is not a proper approach to constitutional reapportionment for the following reasons:

First. It is predicated upon a census shown in its preamble at the time of its introduction to be yet incomplete and which census is not the preceding regular federal or state census taken and completed nearest the apportionment under consideration. It is my opinion that the census provided for at the 1945 session of the legislature is a regular census and may be used as the basis for the present proposed reapportionment but not until its official completion. If you proceed to reapportionment prior to such official completion you should proceed under the 1940 federal census. House Bill No. 1 as now prepared is improperly predicated upon the state census because of the latter's incompleteness. This 1945 state census is a regular census because provided for by the Constitution. See *Sprout vs. State*, 16 So. (2d) page 109.

Second. The bill contemplates only reapportionment of representation in the house of representatives, whereas it should deal with reapportionment of representation in both the house and senate.

I do not mean in the preceding sentence that the legislature cannot proceed in its reapportionment in separate bills, one providing for senate reapportionment and the other providing for reapportionment of the house of representatives, but I do mean that a bill providing solely for reapportionment in one house is not the proper approach to constitutional reapportionment, which means, as I interpret it, the complete reapportionment for both senate and house, and your question being answered deals with constitutional reapportionment.

Third. Reapportionment, as I interpret the term, embodies four factors: (a) as the same affects the actual number of representatives involved, (b) as the same is affected by the number of counties composing senatorial districts, in the one instance; and from which house representation is to be chosen, in the other instance, (c) making senatorial districts as nearly equal as possible in population out of contiguous counties, and (d) distribution of representation in the house among counties for a 3, 2 and 1 representation by groups.

Any bill omitting to treat the subject of reapportionment in its relation to all of these factors is not comprehensive.

Article VII, Section 2, of the Constitution, as originally adopted, provided for 68 members of the house. When amended by Section 4, in order to provide for a necessary increase occasioned by subsequent reapportionment of the house membership, this new language was added, "Any new county that may be created shall be entitled to one member in the house of representatives."

The constitution fixes cycles of ten years, beginning with the year 1925, as the time when the people are entitled to have their representation in the legislature by counties and senatorial districts taken stock of, and contemplates division for such representation to be reapportioned on a just, fair and equitable basis, expressly stating what that basis is to be as to each house. This ten-year reapportionment time is also an important element in this law, because it contemplates and specifies the period of time when reapportionment of legislative representation in a state where the population has consistently increased, is to be made, with the factors above pointed out as the guide therefor.

Fourth. This House Bill No. 1 undertakes to delegate to the governor a legislative duty, to wit: the issuance of a proclamation declaring the results of the 1945 census and proclaiming the five counties of the state entitled to three representatives, the 18 counties of the state entitled to two representatives and the remaining counties entitled to one representative. This is a legislative duty and responsibility and not one appertaining to the functions or duties of the governor. The official population census enumeration is a matter of which the legislature must take cognizance as a predicate or basis for its reapportionment, since its ascertainment has to do with equality of population distribution for senatorial representation, as well as determination of the counties for the 3, 2 and 1 representation in the house of representatives. The governor could not be expected in the nature of things to designate senatorial districts "as nearly equal in population as practicable." The same principle involved with respect to the senate as applied to gubernatorial reapportionment, likewise exists as to the house of representatives; although from a practical standpoint the appropriate reapportionment representation in the house might be more easily ascertainable by the governor than in the senate. The principle, however, does not change because of this difference.

Fifth. As House Bill No. 1 is drafted, it does not make complete any official records of that body, so that execution, predicated exclusively upon the legislative record of the reapportionment in both house and senate, automatically follows. Action by another nonlegislative branch of the government in this bill is being invoked, which action is from the executive and is other than approval or veto of the legislation involved, and therefore without sanction.

2. In my opinion House Bill No. 3 of the present extraordinary session of the legislature is not a proper constitutional reapportionment for the following reasons:

First: It is predicated upon the wrong census population enrollment. The apportionment should be predicated upon the 1940 regular federal census if made prior to completion of the 1945 state census; if made after such completion it should be based upon the last state census.

Second. It deals only with reapportionment for house representation, and ignores senatorial reapportionment. Neither house should consider any bill or resolution which does not contemplate full and complete reapportionment as constitutional reapportionment.

I do not mean in the preceding sentence that the legislature cannot proceed in its reapportionment in separate bills, one providing for senate reapportionment and the other providing for reapportionment of the house of representatives, but I do mean that a bill providing solely for reapportionment in one house is not the proper approach to constitutional reapportionment, which means, as I interpret it, the complete reapportionment for both senate and house, and your question being answered deals with constitutional reapportionment.

Third. It is inappropriate for the same reasons assigned in the third numbered paragraph preceding in my answer to Question 1.

3. I think it can, and my answer is in the affirmative for the following reasons:

There is no limitation upon the legislature's field for constitutional amendment, nor upon its right to propose constitutional amendments, prescribed by our organic law, and the many different factors and elements which enter into the reason for, and the essence of, reapportionment make it entirely possible that division on a just, fair and equitable basis of the people's representation in the house of representatives and in the senate, would require at the end of the ten-year periods prescribed in the Constitution for reapportionment, action, consisting of either a new senatorial set-up or new arrangement of the 3-2-1 classification for the house of representatives. Even the ten-year period itself might be found to be an unwise stock-taking lapse of time and a different time for stock taking found to be desirable. Necessary changes occasioned by such consideration in the present Reapportionment Law could only be effected by constitutional amendments. I admit that the provisions of Article VII, Section 3, of the Constitution indicates an intention for the legislature to reapportion during the ten year cycles contemplated "as required by this amendment before its adjournment," but the existence of this intention even in a constitutional requirement, does not preclude the legislative right to deal with the subject matter involved upon a new constitutional basis, and if its constitutional proposal in so doing covers the entire field of reapportionment involved, in my opinion it has "considered the question of reapportionment" as required by the present Constitution, and has gone as far in reapportioning as it can go in adopting the constitutional process therefor, and satisfies the mandate to the legislature calling for reapportionment. Since the adoption of Article XVII, Section 3, Amendment to the Constitution in 1942, the legislature may at any regular or special or extra session by vote of three-fourths determine that an emergency requiring an early decision by the electors of the State exists, and may submit an emergency constitutional amendment for immediate action within not less than ninety nor more than one hundred and eighty days. Accordingly, a reapportionment amendment complete, submitted at this special session of the legislature, if predicated upon legislative declaration of an emergency to support it, could be voted upon by the people within the short time above stated, and, if accepted, reapportionment would be completed before the time when such reapportionment becomes effective. If not accepted, the legislature could reconvene to continue its reapportioning efforts.

There is nothing in the Constitution preventing the legislature from adjourning with the consent of both houses not sine die, and to convene at a later date; and the constitutional method of reapportionment above outlined, if accompanied by joint legislative adjournment to re-convene at a time certain subsequent to the official determination of the result of the special constitutional election; by so doing it would still be within the mandate of the executive call for the reapportionment session, and could still prior to sine die adjournment complete by statute or otherwise, reapportionment which had failed under its constitutional proposal. As long as there existed the time within which the reapportionment might be completed, prior to its possible effective date, this above outlined process could be repeated. The possible effective date of any reapportion-

ment made at this time would be November 4, 1946, which is the date when the terms of office of the present members of the house of representatives expire, and the terms of office of one-half of the membership of the senate.

Article III, Section 13, implies an unrestricted right of temporary, as distinguished from sine die, adjournment when both Houses consent thereto. Article XVII, Section 3, (1942 Amendment to Constitution), provides for three-fourths of all members elected to each house agreeing upon what constitutes an emergency, declaring the same, and that it is of such a character as to require an early decision by the electors of the state, and the proposal and adoption by the same kind of three-fourths vote of an amendment to the Constitution dealing with the subject matter of such emergency, and the calling at the same time of a special election within not less than 90 nor more than 180 days "after adjournment" to vote upon the proposed amendment. This amendment does not specify whether the adjournment referred to in it is a sine die or a day certain adjournment, but irrespective of its legal interpretation in this respect, I am of the opinion as above stated that the combined provisions of such amendments make possible the carrying through of the reapportionment in the manner heretofore stated. The fact that Article VII, Section 3, of the Constitution provides that "The legislature is hereby mandatorily required to reapportion the representation as specified in this amendment before its adjournment," does not in my opinion operate or apply in derogation of my construction as herein arrived at in the opinion here expressed of the validity of the constitutional process for reapportionment. There is no authority or power in our law giving the right to control the legislative discretion, and when the members of the legislature in the exercise of that discretion cannot agree upon a statutory method or plan for reapportionment, there exists a fundamental power in them to proceed in their efforts to accomplish reapportionment by resort to a new constitutional program embodying as it does the constitutional referendum to the people for final approval and adoption, and as pointed out herein, there is ample constitutional provision and authority for the necessary procedure to bring this about.

In concluding this opinion, I would like to state that our Constitution does not give any recognition to any geographic separation of our state. It is neither a North nor a South Florida Constitution but rather an all-Florida instrument and contemplates that apportionment of representation in the legislature in both house and senate shall be predicated upon a population by counties and by senatorial districts in and of our entire state, and this is a fundamental principle which attaches itself necessarily as the background of all of the law governing any legislative reapportionment effort.

May 22, 1945.—045-122.

SENATE—REAPPORTIONMENT OF REPRESENTATION

QUESTION: Would a provision in a law relating to redistricting the senatorial districts of the state, which provides that same should take effect on the general election day in 1946, and that the senators holding over in office on that day for the remainder of their terms subsequent to such date should each be deemed to be the senator for the senatorial district embracing the county of his residence, be valid, even though the effect thereof might be to add to the district of a hold-over senator a county in which the electors were afforded no opportunity to vote for or against such senator?

To Honorable Tyn Cobb, Jr., Chairman, House Committee on Elections, House of Representatives:

By Section 2, Article VII, Florida Constitution, (as amended at the general election in 1896), it was provided that "the terms of office of the senators elected in October, A. D. 1896, shall expire on the first Tuesday

after the first Monday in November, A. D. 1900, and the terms of office of those elected in November, A. D. 1898, shall expire on the first Tuesday after the first Monday in November, A. D. 1902, and thereafter all senators shall be elected for four years."

Amended Section 3, Article VII, Florida Constitution, provides, in part, that the "Legislature that shall meet in regular session, A. D. 1925, and those that shall meet every ten years thereafter, shall apportion the representation in the senate, and shall provide for thirty-eight (38) senatorial districts, such districts to be as nearly equal in population as practicable, but no county shall be divided in making such apportionment, and each district shall have one senator . . ." Said Section 3 also provides, in effect, that if the legislature, at the time stated, shall fail to apportion the representation in the House and Senate, the Governor shall (within thirty days after adjournment of the regular session) call the legislature together in extraordinary session to consider the question of reapportionment and the legislature is mandatorily required to so reapportion such representation.

Should there be a reapportionment of representation in the State Senate by the legislature during its 1945 session in pursuance of said Section 3, Article VII, effective at the time set forth in the above question, it would seem it would not be improper if as a result thereof a hold-over senator should have included in his district a county in which the electors had not been afforded the opportunity of voting for or against such official.

In view of the foregoing, in my opinion, the above question should be answered in the affirmative.

May 4, 1945.—045-104.

CONSTITUTIONALITY OF HOUSE BILL NO. 357

QUESTION: Is House Bill No. 357, relating to the Florida Real Estate Commission, constitutional?

To Honorable Neil C. McMullen, Chairman, Judiciary "C" Committee, House of Representatives:

From an examination of the bill, I am impressed with the fact that throughout it delegates powers of the courts and powers of the legislature to the real estate commission, also, that it undertakes to require brokers and salesmen to be residents of the State of Florida in order to be eligible for registration for such. This latter feature in a former similar law has been heretofore declared unconstitutional by the Supreme Court of Florida.

The rule-making power of the commission in this proposed act goes far beyond the protection of any public interest and seems to have as its purpose the establishment of a very definite class protectorate. It smacks of closed shop tenets in some of their worst forms.

The act gives judicial powers to the board throughout, which, in my judgment, will not stand constitutional tests.

It is my opinion further that the act goes far beyond any public interests that may be entrusted to other than a court in the powers intended to be given to the commission for administration.

The act would give certain rule-making power to the commission "in the exercise of its powers" and when you read the powers undertaken to be given it by its terms and then add to those powers the right to make rules, by-laws and regulations in their administration, in my opinion, there will have been established an authority whose rule-making power may, in the exercise of same, encroach upon the powers of both the courts and the legislature.

The bill is too long to recite section by section in the rendition of this opinion, but in what I have said, I have predicated the same upon a review of it in such detail.

Returned herewith you will find the copy of said bill considered in the drafting of this opinion.

May 21, 1945.—045-117.

HOUSE BILL NUMBER 597—CONSTITUTIONALITY

QUESTION: Is House Bill Number 597 constitutional?

To Honorable T. A. Delegal, Chairman, House Committee on Public Health, House of Representatives:

The bill provides that one of the members of the three-member commission shall be the entomologist of the State Board of Health and that another member shall be the head of the pest control division at the university. Members of the commission would be public officers and, therefore, must be either elected or appointed by the governor, and the bill is unconstitutional in violating that rule in regard to those two members. As to the third member, the bill restricts the governor's appointment to a list of names of properly qualified individuals, which list is to be supplied by the industry. This also, in my opinion, is an unconstitutional limitation of the governor's appointive power.

In my opinion, Section 3 violates the due process clause of the Constitution in so far as it authorizes revocation of license without hearing or right of appeal.

Section 4 of the bill authorizes the commission to establish "reasonable professional criteria for structural pest control operators," etc. I consider this an unconstitutional delegation of legislative power to the commission. The statute must set up, at least in general terms, the subjects and practices on which the applicant must be examined.

Section 6 requires a \$2,000.00 bond conditioned that the operator will faithfully and honestly conduct his business. I think this is an unreasonable discrimination against such operators. There is no more reason, under the law, why such an operator should post a bond than the operator of any other business or profession for services to the public.

The license tax of one per cent on the gross income derived from business comes very close to an income tax, prohibited by the State Constitution. We have two cases construing similar statutes, one holding that the tax was income tax, and the other holding that it was not income tax. The validity of this provision is, therefore, at least doubtful.

In Section 11 there is again unlawful discrimination in that an operator who is not licensed might be employed by the owner of the property to do the same work as is done by the licensed operator.

Time has not permitted an exhaustive examination of the bill and there may be other constitutional objections. For example, it is not clear under the wording of this bill that a corporation might operate without a license and, therefore, an unlawful discrimination. Aside from constitutionality, it might not be out of place to point out that this bill is contrary to recommendations of the joint economy and efficiency committee report in several respects: (1) It sets up another commission which is not necessary, in that the matters covered by this bill are properly within the field of the State Board of Health. (2) It does not require deposit of revenue in the state treasury. (3) It permits expenditure of funds by the commission more or less as it sees fit, without any accounting to anyone.

For the reasons stated, I think the bill is so defective as to require complete rewriting and that can be properly done only as a result of conferences between experienced men on the State Board of Health and entomologists and one or more members of the industry.

May 30, 1945.—045-131.

LEGISLATIVE EXPENSE—ALLOWANCE

QUESTION: Is there a legal question involved in the payments related to in House Resolution No. 27? If so, what is it and what is your opinion on the same?

To Honorable J. M. Lee, State Comptroller:

The resolution in question provides:

"That there be paid to each member of the House of Representatives of the 1945 session, upon his requisition filed with the Legislative Expense Committee . . . an amount not to exceed \$240.00 per member as full reimbursement to each member for his expense allowed hereby, and the Legislative Expense Committee of the House of Representatives is hereby directed to approve the same and charge such amounts as legislative expense for the 1945 session."

In my opinion, this resolution in the particular quoted provisions presents the following legal questions:

1. Does Section 4 of Article III of the Constitution of Florida inhibit a payment, regardless of its classification, to members of the legislature in excess of \$6.00 a day for each day of the session and mileage to and from their homes to the seat of government not to exceed ten cents a mile each way?

2. Does the resolution in its quoted provision relate to that which should be classified as pay or mileage?

3. Has the legislature the authority to make provision for legislative expense and direct its legislative expense committee to approve as expense that which one branch of the legislature, to wit, the house of representatives, by resolution defines and classifies as such?

In attempting to answer these questions, I find myself confronted with a decision of the Supreme Court of Florida in re Advisory Opinion to the Governor decided December 4, 1925, reported in 107 So. 366.

I am assuming that the legislature will adopt, as it did in the Legislative Expense Bill of 1943, a similar provision to Section 8 of the 1943 Act. This legislative expense bill contains an appropriation of "so much money as may be necessary to carry out the provisions of Section 3 and Section 8" thereof. The Section 3 referred to provides for payment of the constitutional per diem and mileage; the Section 8 referred to provides for payment of legislative expense—senate and house. State warrants will have to be issued in ultimate fulfillment of the legislative expense appropriation, which warrants will have to be signed, as usual, by the comptroller and the governor.

The constitutional provision involved (Article III, Section 4) being a limitation on the power of the legislature and without effect upon any unused power regarding the subject matter not so limited, and it being within the authority and power of either house of the legislature to make provision for and classification of its legitimate expense, I am inclined to the opinion that the resolution in question is a valid use of legislative power. However, the supreme court decision in the advisory opinion

first refered to above prevents my following this theory and I am therefore advising you that you should request the governor to ask for an advisory opinion from the court in the specific instance regarding your right to pay the expense in question. I will be glad to prepare at once the necessary communication from the executive to the court for such advisory opinion upon the governor's request therefor.

LEGISLATION

May 21, 1946.—046-222.

SENATE COMMITTEE—INTERIM POWERS

QUESTIONS: Can the necessary expense of the committee and its employees, authorized by Senate Resolution No. 16—1945, be legally incurred for investigations to be made outside of the session of the legislature?

Is it possible for the committee, authorized by said resolution, to subpoena witnesses before it and legally incur the expense of such witnesses?

If you answer the two above questions in the negative, do we still have the authority to go ahead and make the investigations. In other words, to summons witnesses and hear witnesses even though we do not incur any expense for such investigations?

If we can legally conduct these investigations, would it be possible for the expense of same to be paid out of a contingent fund or other fund without regard to the appropriations set forth in this resolution?

To Honorable Walter W. Rose, Orlando, Florida:

To Honorable W. A. Shands, Gainesville, Florida:

Your committee was authorized and appointed under the provisions of Senate Resolutions Nos. 2 and 8 of the 1943 session and was by Senate Resolution No. 16, increased by two additional members and authorized to do its investigating during the remainder of the 1945 session and in the interim between said 1945 session and the 1947 session.

It will be noted that your committee gets its power and authority from the said three resolutions and these only.

It is my opinion that your committee, being authorized to make investigations and hold its sessions after the adjournment of the legislature, could not be created by resolution of the Senate only.

I am unable to find where our Florida courts have expressly passed upon this question, but the courts of other states have and the general law is that no such committee can be created by resolution of only one branch of the legislature.

§41.—Creation by Resolution or Act; Power to Act after Adjournment of Legislature.—It is generally conceded that a legislative committee which is a function during the sessions of the legislature may be created either by a separate resolution of one branch of the assembly or by a concurrent resolution of both branches. Either house may appoint separate committees or the two houses acting concurrently may appoint joint committees for any proper purpose, and these committees may exercise during the sessions of the legislature such power or powers as the house or houses appointing them may lawfully delegate or impose, although only such powers can be delegated as are possessed by the house or houses making the appointment. Of course, such a committee may function under a regularly passed act of the legislature or general assembly.

"A legislative committee may be given power to sit during the interim between sessions of the legislature. In the absence of special authority, however, committees appointed by the legislature have no power to sit after adjournment sine die of the legislature, and inasmuch as in the absence of legislation, the existence of all committees necessarily determines upon the adjournment of the body to which they belong, there must be an explicit enactment that the sessions of the committee can be held after such adjournment, or at least a clear and unmistakable implication to that effect from the words used in the act creating the committee, before it can be a legally created committee to sit after the adjournment of the legislature. Moreover, authority of a committee to sit during a recess of the legislature must ordinarily be derived from the joint act of both houses, that is, from a regularly passed act of the assembly. A legislative committee authorized to make investigations and hold its sessions after the adjournment of the legislature cannot be created by one body of the legislature by a resolution which is not concurred in by the other. According to most authorities, a mere concurrent or joint resolution of both houses which calls into being a legislative committee or continues the existence of such a committee is not sufficient to give the committee life after the functions of the legislative body as such have ceased with its adjournment, sine die, except in those jurisdictions where joint resolutions are recognized as equivalent to laws enacted by bills. In the latter case, the resolution creating the committee must contain an explicit provision empowering the committee to sit after adjournment, or the implication to that effect must be clear and unmistakable." (Emphasis supplied)

49 Am. Jur. 258

"The general rule seems to be that a legislative committee, authorized to make investigations and hold its sessions after the adjournment of the legislature, cannot be created by a resolution of one body of the legislature, which is not concurred in by the other. Ex parte Caldwell (1905) 138 Fed. 487 (reversed in (1906) 200 U. S. 293, 50 L. ed. 488, 26 Sup. Ct. Rep. 264, on ground that no Federal question was involved); Tipton v. Parker (1903) 71 Ark. 193, 74 S. W. 298; Com. v. Costello (1912) 21 Pa. Dist. R. 232; Com. v. McCall (1912) 21 Pa. Dist. R. 238; Ex parte Wolters (1912) 64 Tex. Crim. Rep. 238, 144 S. W. 531, Ann. Cas. 1916B, 1071; Ex parte Caldwell (1906) 61 W. Va. 49, 10 L.R.A. (N.S.) 172, 55 S.E. 910, 11 Ann. Cas. 646."

28 A.L.R. 1156

See also Advisory Opinion to the Governor, 22 So. 2d. 397, while not directly on this point, should be considered.

Inasmuch as your committee was created by resolution of the Senate only and, therefore, has no power or authority to conduct investigations after adjournment of the legislature but only during the legislative sessions, all of your questions should be answered in the negative.

January 2, 1946.—046-4.

INTERIM COMMITTEE EXPENSE

QUESTION: Is there an appropriation for the expenses, not exceeding \$750.00, incurred in the performance of its duties by the joint legislative committee for the investigation of state institutions, which was created by House Concurrent Resolution No. 9 of 1945?

To Honorable Dave Thomas, Joint Legislative Committee for the Investigation of State Institutions, Pensacola, Florida:

House Concurrent Resolution No. 9 of 1945 directs the appointment of a joint committee from the membership of the Senate and House of Representatives to conduct an inquiry into the management and administration of various state institutions. The last paragraph of the resolution is as follows:

"Be it further resolved that the joint committee provided for herein be and it is hereby authorized to incur expense not to exceed the sum of \$750.00 in its activities and such sum is hereby set aside, designated and earmarked as a proper and appropriate expense of this 1945 session of the Florida Legislature, and the Comptroller is directed to pay bills for such expense as the same are submitted when approved by the chairman of the committee."

Section 11.12, 1943 Supplement To Florida Statutes, 1941, makes an appropriation of a sum not exceeding three hundred thousand dollars biennially to defray the legislative expenses described in that section, including "such expenses of the legislature as shall be authorized by a resolution of either house."

Under Section 4 of Article 9 of the Florida Constitution, an appropriation of public money cannot be constitutionally made by a resolution of the legislature, without an enacting clause. In re Advisory Opinion, 31 So. (Fla.) 348. House Concurrent Resolution No. 9 does not contain an enacting clause, so is not effective as making an appropriation for the expenses of the committee created by its provisions.

However, in the resolution the legislature has declared that such expenses are a "proper and appropriate expense of this 1945 session of the Florida Legislature" and has authorized the committee to incur expenses not exceeding \$750.00, so it is my opinion that those expenses, in the maximum amount of \$750.00, are "such expenses of the legislature as shall be authorized by a resolution of either house", for which an appropriation is made by Section 11.12, 1943 Supplement to Florida Statutes, 1941, referred to above. It is assumed that this sum will not constitute an excess above the biennial appropriation of three hundred thousand dollars contained in that section.

In short, the resolution authorizes and limits the expenses of the committee, which are to be paid out of the appropriation made by Section 11.12, and is valid and enforceable.

August 25, 1945.—045-262.

VALIDITY OF AN ACT

QUESTION: Is Chapter 22632 (Senate Bill No. 312), Acts of 1945, valid?

To Honorable Colin English, State Superintendent of Public Instruction:

In enacting this bill, no effort was made to comply with the constitutional requirements for local and special bills. It was passed as a general act. It fixes the salaries and mileage of members of the board of public instruction in counties of not less than 15,000 and not more than 16,000, inhabitants, according to the federal census of 1940. It is applicable to only one county.

Whether a statute is valid or not is a matter which must be determined by the court. However, I may point out that statutes, such as this act, applicable to closely restricted population brackets, have been before the court frequently, and in every instance they have been held invalid as unreasonable and arbitrary classifications of counties when enacted as general laws.

July 16, 1945.—045-187.

SPECIAL ACTS—REQUISITES FOR VALIDITY

QUESTIONS: 1. Was Senate Bill No. 801, 1945 Session, legally enacted?

2. Did Senate Bill No. 801, 1945 Session, repeal Chapter 22476, Special Laws, 1943?

To Honorable James T. Vocelle, Director, State Beverage Department:

Your letter of June 20 requesting an opinion upon the two questions above has been received. I have reviewed the documents attached to your letter, the same being a certified copy of the subject bill and of the notice required by the constitution and statutes of the intention to present the bill for enactment, affidavit of the publisher of the newspaper in which the notice was inserted, all under the certificate of the secretary of state, and the journal of the senate memorializing its procedure on May 30, 1945. From inspection of the foregoing documents, it is my opinion that Senate Bill No. 801 was legally and regularly enacted. The question is governed by Chapter 21365, General Laws of 1943, prescribing the procedure necessary to be followed to validate the passage of a local or special bill. The quoted statute prescribes the form of notice, but recites that the same shall not be exclusive. The form of notice submitted herewith under the certificate of the secretary of state contains all statutory and constitutional requisites of a notice of intention to present the bill. The affidavit of the publisher was attached to, and referred to, the notice and indicates its publication on March 17, more than thirty days prior to the date of its introduction in the senate. The records of the proceedings in the senate show evidence that the requisite notice had been published, and its publication was established by the senate.

With regard to the second question propounded, I am of the opinion that Senate Bill No. 801 was effective to repeal Chapter 22476, Special Laws of Florida, 1943. Section 16, Article III of the Constitution of Florida referred to in your letter in connection with the second question is not applicable to repeal of statutes, but merely to revision or amendment thereof. An existing statute or section of a revision may be repealed by reference to its number only.

July 18, 1945.—045-192.

SINGLE BILL LEVYING ALL STATE TAXES

QUESTION: Would one bill levying all state taxes for all purposes meet the requirements of the constitution or would separate bills on each subject be necessary?

To Honorable Millard F. Caldwell, Governor:

In reply to the foregoing inquiry I beg leave to state that it is my opinion that there is no constitutional obstacle to a codification or revision of the tax laws in one bill, such as for instance the Probate Law, the Negotiable Instruments Law, and of course, Florida Statutes, 1941, and many other codifications and grouping of statutes relating to one general subject.

The validity of such statute has not only been recognized in practice and assumed to be valid and proper, but in the case of Broward, et al. vs. Broward, et al., 117 So. 691, Mr. Justice Whitfield, writing for the Supreme Court of Florida in the eighth headnote and supporting opinion, page 693, used the following language:

"General and comprehensive statutes that are designed to regulate an entire subject supersede all common law rules in the premises and the valid provisions of the statutes are the controlling law."

This broad statement would seem to control the matter in favor of validity.

A concrete example of the possibilities of such codification is to be found in Chapter 20722, General Laws of 1941, which was held valid against an attack based on Article III, Section 16 of the Constitution in the case of Rudisill, et ux vs. City of Tampa, et al, 9 So. 2d. 380.

Care must be taken, however, to avoid traveling too far afield so as to include matters having no logical or visible relation to the general subject treated; and also to avoid attempting to affect constitutional taxes, such, for instance, as the gasoline tax administered by the board of administration.

CHAPTER IV

EXECUTIVE DEPARTMENT

GOVERNOR

September 29, 1945.—045-304.

EASTERN STANDARD TIME—WEST OF APALACHICOLA RIVER

QUESTION: 1. Does the governor have the authority, by executive order or official proclamation, to make Eastern Standard Time applicable to that portion of Florida lying west of the Apalachicola river?

2. If the answer to the first question is in the negative, what course should be pursued in order to make Eastern Standard Time applicable to that portion of Florida lying west of the Apalachicola river?

To Honorable Millard F. Caldwell, Governor:

A brief outline of the history of standards of time in Florida and the United States in general seems pertinent in answering the two questions. Prior to the year 1883 considerable confusion existed in the relations between different sections of the country because of the fact that the various localities conducted their affairs according to standards of solar time or mean solar time, and numerous different interpretations were given these standards by the respective localities to best suit what they deemed to be their convenience.

In an effort to eliminate these innumerable variances, the railroads of the United States and Canada in 1883 adopted four kinds of standard time, namely: Eastern, Central, Mountain and Pacific, each being applicable to a region covering approximately 15 degrees of longitude and standard time in each case being the actual sun time at the central degree of longitude of the region to which the particular standard time applied. This measurement of time, prior to the enactment of any statutory provision on the subject, was officially recognized by the Federal Government, and gradually came into general use in most places in the United States. 52 Am. Jur. 331.

In 1889 the Florida Legislature adopted central time as the official standard for the entire State through the enactment of Chapter 3916, providing as follows:

"Whenever specific hours are designated in the statutes of this State, during which legal proceedings may be had, the same shall be understood to mean standard time of the central or 90th Meridian."

Although this law, as amended by Chapter 6938, Acts of 1915, remained on the statute books of Florida until the statutory revision of 1941, its practical effect was nullified when Congress first entered the field of regulation of standards of time through the medium of the Act of March 19, 1918, C. 24, 40 Stat. 450, (15 U. S. C. A. 261-263). The latter act, as amended, divides the territory of the continental United States into five zones of approximately 15 degrees of longitude each, authorizes the Interstate Commerce Commission to define the exact limits of each zone and provides that within the respective zones the standard time shall be the mean astronomical time of designated degree

of longitude west from Greenwich. For the first, or Eastern, zone the 75th Meridian is controlling and for the second, or Central, zone the 90th Meridian governs. The fifth zone embraces only Alaska, which was not included in the standard time plan formulated by the railroads.

Pursuant to the provisions of the act, in 1918 the Interstate Commerce Commission placed in the Eastern Zone all that portion of Florida lying east of the Apalachicola river and in the Central Zone, the remainder of the state. Congress enacted temporary daylight-saving measures in 1918 and 1942, but neither of these affected the identities or boundaries of the time zones and both emergency acts have been repealed.

The Federal Standard Time Act of 1918 is applicable only to: (1) the movement of common carriers engaged in interstate and foreign commerce; (2) Federal officials and departments; (3) all acts done by any persons under federal statutes, orders, rules and regulations. The prevailing view is that Congress has the power to regulate standards of time under the authority granted to it to fix the standard of weights and measures by Article I, Section 8, of the Federal Constitution. It is equally well settled that since Congress has assumed only limited jurisdiction in the regulation of time standards, the states may enact legislation fixing such standards in relation to purely state and local functions and activities. *Massachusetts State Grange v. Benton*, 272 U. S. 523. However, everyday activities in the State and Federal fields are so closely interwoven that extreme confusion would result if the states should exercise that power; so the Federal Standard Time Act and the orders of the Interstate Commerce Commission implementing it are generally accepted by the states as fixing the time standard for every aspect of the affairs of their people.

This course has been followed by the Legislature of Florida in adopting the Statutory Revision of 1941, in which the following appears as Section 1.02, Florida Statutes, 1941:

"In all laws, statutes, orders, rules and regulations of this state, relating to the time of performance of any act by any officer or department of this state, whether in the legislative, executive or judicial branches, or relating to the time within which any rights shall accrue or determine, or within which any act shall or shall not be performed, by any person subject to the jurisdiction of this state, it shall be understood and intended that the said time shall be the United States Standard Time of the zone within which the act is to be performed or the right shall accrue or determine."

From the foregoing, it is apparent that the Florida legislature has assumed that it is clothed with the power to regulate standards of time within the state to the extent that this may be done without conflict with the federal law, and I am aware of no state constitutional provision that would render such assumption erroneous or grant to the governor power to supersede those legislative regulations by executive order or official proclamation. Obviously, the governor is without authority to supersede the federal act or the order of the Interstate Commerce Commission issued under the powers delegated to it by Congress. Therefore, it is my opinion that the first question should be answered in the negative.

One of two courses may be pursued to cause that portion of Florida lying west of the Apalachicola river to be placed in the Eastern Time Zone. This end might be accomplished through a petition to the Interstate Commerce Commission. The Federal Standard Time Act authorizes the Commission to modify from time to time its order defining the limits of the several time zones.

The second, and probably preferable, course would be a concerted effort to induce Congress to amend the Standard Time Act. There is ample precedent for such action by Congress. By its Act of March 4, 1921, C. 173, (15 U. S. C. A. 265), the western portions of Texas and Oklahoma were transferred from the Mountain to the Central Time Zone in order that the two states in their entirety would be in the latter zone. Also, by an Act of March 3, 1923, C. 216, (15 U. S. C. A. 264), a part of Idaho was transferred from the Pacific to the Mountain Zone.

The flexible quality of the present Florida statute regulating time standards for state activities precludes the possibility of its conflict with changes in the limits of time zones that might be made by Congress or the Interstate Commerce Commission, or the possibility of there being confusion resulting from such changes. In the provision that "the said time shall be the United States standard time of the zone within which the act is to be performed or the right shall accrue or determine," the Florida Law makes itself conformable to the federal regulations of time standards and to any amendments to such regulations.

July 9, 1945.—045-178.

UNIVERSITY OF FLORIDA—EXPENSES OF INVESTIGATION,
PAYMENT

QUESTION: May Mr. "X" be reimbursed for expenses incurred in connection with the recent legislative investigation of the University of Florida, the president of the university and the Board of Control, and, if so, what funds are available for such reimbursement?

To Honorable Millard F. Caldwell, Governor:

You have forwarded a claim made by Mr. "X" for reimbursement of certain expenses which he incurred in connection with the recent legislative investigation of conditions at the university, of the president of the university, and the Board of Control.

The statement of expenses submitted is made up of four types of items: mileage for attendance at the hearings, \$55.50; telephone and telegraph expenses, presumably incurred in connection with maintaining the charges filed by Mr. "X," \$76.45; attorneys' fees, \$1,075.00; and transcript of the record of proceedings by the legislative investigating committee at Gainesville, \$95.25.

As a member of the Board of Control, Mr. "X" would be entitled to his mileage for attendance at the hearing the same as if he were attending a regular meeting of the Board of Control. The reimbursement of that part of the claim may be made in the usual manner by his requisition submitted to the Board of Control for its approval as in all such cases.

Presuming, as I do, that the charges filed by Mr. "X" were filed in good faith and in all sincerity, it is my opinion that the State Board of Education, which has supervision of the university and which might have lawfully authorized reasonable expenditures in connection with investigating the charges, may now inquire into the reasonableness of the expenses incurred and approve such of them or so much thereof as the board may find reasonable and justifiable under the circumstances and direct the reimbursement thereof from funds appropriated for the university and available for such purpose.

SECRETARY OF STATE

June 26 1946,—046-267.

DUTIES—COMMISSIONS—ISSUANCE

QUESTIONS: You have received from Governor Caldwell notice that he has made the following appointment: "N. Vernon Hawthorne, Circuit Judge, in and for the Eleventh Judicial Circuit of the State of Florida, succeeding the present incumbent Marshall C. Wiseheart, for the unexpired term ending the first Monday after the first Tuesday in January, 1949." You state that the records of your office evidence no vacancy in any circuit judgeship in the eleventh judicial circuit. Upon the basis of the foregoing, you inquire:

(1) If upon presentation of the qualification papers by the appointee, N. Vernon Hawthorne, should you prepare a commission and present to the governor for his signature in the instant case?

(2) If the above question is answered in the affirmative, should the commission be prepared to read, "until the end of the next Senate," and should it include the wording "to succeed Marshall C. Wiseheart, incumbent"?

To Honorable R. A. Gray, Secretary of State:

All commissions shall be "sealed with the great seal of the State, signed by the governor, and countersigned by the secretary of state." Article IV, Section 14, Florida Constitution. The appointment to fill a vacancy is a responsibility and prerogative of the governor. The function of the secretary of state with respect to issuance of a commission to such an appointee of the governor is ministerial and not one involving discretion. *State ex rel. Fleming vs. Crawford, Secretary of State, 28 Fla. 441, 10 So. 118.*

In the absence of a request for advice from the governor with respect to the wording of an appointment of this nature, I hesitate to comment officially with respect thereto.

In view of the foregoing, in my opinion your above questions properly are answered in the numbered order as follows:

(1) The answer to the first question is in the affirmative.

(2) Any commission you prepare for the governor should follow his instructions; hence, in the absence of further instructions from him, you should follow the instructions set forth in his above quoted notice of appointment.

STATE COMPTROLLER

September 11, 1945.—045-285.

STATUTORY REVOLVING FUNDS

QUESTION: What is the effect, if any, of Section 13, Chapter 22827, Laws of Florida, Acts of 1945 (the 1945 Appropriations Act), upon statutes and laws relating to revolving funds under the control of several of the departments of state government?

To Honorable J. M. Lee, State Comptroller:

Other questions concerning revolving funds established without express statutory authority will be answered by a separate opinion.

Revolving funds are set up by statute for and used by the following departments and agencies of the State, to wit: State Livestock Sanitary Board (see Sections 585.06 and 585.07, Florida Statutes, 1941); Military Department (see Section 250.72, Florida Statutes, 1941); University of Florida, Florida State College for Women, Florida Agricultural and

Mechanical College, Florida School for the Deaf and Blind, Florida Farm Colony, State Prison Farm, Florida Industrial Schools and Florida State Hospital (see Section 240.10, Florida Statutes, 1941).

In an opinion issued by this office under date of June 29, 1945, it was held that Section 13 of Chapter 22827, Acts of 1945, did not repeal the provision of Section 240.10, Florida Statutes, 1941, in so far as it relates to the revolving fund of the Agricultural Experiment Station.

Upon further consideration of the question no reason appears for overruling that holding and the same is adhered to. This would seem to answer the question as to all other institutions named in said section. The same rule would also appear to be applicable to all other statutory revolving funds.

In auditing vouchers and receipts for funds paid out under revolving funds the state comptroller should see to it that statutes providing for such revolving funds are complied with and that only such items are paid from such funds as are expressly and impliedly embraced therein, and it is my opinion that each statute must be separately construed in the implied interpretation given it, with respect to the *expense* allowed to be paid out of the revolving fund. There will be many instances where items of expense may be allowed that are not expressly mentioned in the statute prescribing the "revolving fund" payments. In the auditing of such vouchers and receipts the purpose and intent of such funds should be taken into consideration. Where the statute provides a revolving fund for the payment of certain items or accounts not within necessary and regular expense, only such items and accounts should be paid from such fund. Where reimbursement to a revolving fund is made upon vouchers and receipts of moneys properly paid from such fund, the revolving fund is the ultimate beneficiary for such reimbursement within the meaning of Section 13, Chapter 22827, Acts of 1945.

I am, therefore, of the opinion that Section 13, Chapter 22827, Acts of 1945, does not affect any of the above mentioned statutes providing for revolving funds and that the comptroller may continue to draw warrants to the several revolving funds above mentioned as has heretofore been done, but requiring that the payments from such funds be kept within the purview of the statutes providing for such revolving funds.

STATE TREASURER

October 10, 1945.—045-318.

BONDS—WITHDRAWAL AND SUBSTITUTION

QUESTION: Where securities consisting of bonds of the United States have been pledged by a bank to secure state funds deposited therein, and are held for the state treasurer by another bank which has issued to such official its "Safekeeping Receipt" as required by Section 18.11 (2), Florida Statutes, 1941, such bonds being worth par or better on the open market and having been valued at par in the manner provided by Section 18.11 (1), Florida Statutes, 1941, may the state treasurer consent that the pledger bank may withdraw and substitute therefor other bonds of the United States, even par value for par value, without further authorization as to each particular instance of such withdrawal and substitution, provided the bonds so withdrawn and those substituted are worth par or better on the open market?

To Honorable J. Edwin Larson, State Treasurer:

By Section 18.11 (1), Florida Statutes, 1941, the governor, comptroller and treasurer are required to value the securities pledged by a bank in which state funds are deposited. In lieu of the actual deposit with the treasurer of securities required of a bank in which money of the state is deposited, such official may accept a safekeeping receipt from

another bank to which has been delivered such securities by the pledger bank, all as set forth and described in Section 18.11 (2), Florida Statutes, 1941. Among other things, said safekeeping receipt provides that the bank issuing such receipt is authorized and empowered to surrender, release or deliver said securities so held by it only upon the sole written direction and authorization of the state treasurer.

It is apparent that when there is a withdrawal and substitution of such securities, the provisions of said Section 18.11 (1) are invoked as to valuing such proposed substituted securities. It would seem that in each instance before there may properly be a withdrawal of securities, the governor, comptroller and treasurer must value the securities proposed to be substituted therefor.

In view of the foregoing, in my opinion the above question properly is answered as follows:

In each instance in which there is a withdrawal and substitution of securities of the nature and under the circumstances contemplated by the above question, the substituted securities must be valued in the manner provided by Section 18.11 (1), Florida Statutes, 1941. Hence, it appears that it would not be proper for the state treasurer to execute a written instrument, the purpose of which would be to authorize the withdrawal and substitution of such securities by the pledger bank from time to time without the further written consent of the state treasurer with respect to each instance of substitution.

May 23, 1946.—046-229.

BONDS AND COUPONS—DEPOSITS

QUESTION: What duly devolves upon the state treasurer under Chapter 23345, Laws of Florida, Acts of 1945, with respect to certain bond and interest coupons heretofore received by him from the tax officials of Indian River county and held by the state treasurer in trust as custodian thereof, all as provided by Chapter 16482, Laws of Florida, Acts of 1933?

To Honorable J. Edwin Larson, State Treasurer:

Bonds of the total par value of \$21,000, and interest coupons of the total par value of \$16,560, have been delivered to the state treasurer apparently under the provisions of said Chapter 16482; and in pursuance of said law he holds such securities as custodian. It is assumed that certain of such interest coupons were used to redeem or pay taxes and that others thereof, not matured, were attached to the bonds so delivered in payment or redemption of taxes, as contemplated by said Chapter 16482. Said Chapter 23345 authorizes the clerk of the circuit court of Indian River county to cancel such securities, upon approval of the board of county commissioners of said county, all in the manner and under the circumstances as provided in said act. While it is not specifically provided in said act, it is apparent the act contemplates that the state treasurer shall deliver said securities for cancellation to such clerk, upon request therefor. No such request has thus far been made.

The information furnished does not evidence to what extent, if any, said securities were used to pay taxes other than taxes imposed specifically for the retirement of such respective securities used in payment or redemption of taxes. It appears likely, however, that the securities were used to pay all forms of county taxes, in view of the provision in Section 3 of said Chapter 16482 that such securities should "constitute an asset in trust held by the custodian thereof for the use and benefit of the county, district or municipality for whose taxes the same was accepted in exchange and the interest of each shall exist in such asset in the proportion that the taxes of each redeemed thereby bore to the whole tax represented by the tax certificate or other tax lien."

If taxes other than, or in addition to, those imposed by the taxing unit or district issuing the securities were redeemed or paid by these securities, then under Section 3 of said Chapter 16482, the state treasurer holds such securities in trust for the respective districts or units whose taxes were so redeemed or paid thereby, the interest of each being fixed and defined by said section. In other words, instead of each unit or district receiving its taxes in money, it was, by said Chapter 16482, granted an interest in each security so received to the extent that the same paid its taxes—a property right as valuable as money. Thus, if such is the case, a cancellation of said securities without an accounting between the several taxing units or districts which may be interested therein would be tantamount to a diversion from one district or taxing unit of taxes imposed therein and therefor to another district or taxing unit. It is recognized that the proceeds of taxes imposed for a particular purpose may not be diverted to another purpose, without legislative authority. *Oven vs. Ausley*, 106 Fla. 455, 143 So. 588; *State ex rel. Keefe vs. Adams*, 106 Fla. 733, 143 So. 644. However, it seems to be the better rule that even the legislature cannot divert tax proceeds collected by one tax district to another. *Cooley on Taxation*, 4th Addition, Vol. 4, Sec. 1817, pages 3569-3571, and authorities there cited. If cancellation of such securities without adjustment as between several districts or units interested therein would be invalid, it cannot be said with definiteness that the state treasurer, in delivering such securities for cancellation, might not become involved thereby. If he is affected personally by the performance of any act in pursuance of an invalid law, he may interpose such invalidity as reason for nonperformance. *Board of Public Instruction of Santa Rosa County vs. Croom*, 57 Fla. 347, 48 So. 641; *State ex rel. Harrell vs. Cone*, 130 Fla. 158, 177 So. 854.

In view of the foregoing, in my opinion the above question properly is answered as follows:

(1) Until request is made of the state treasurer for delivery of such securities for cancellation, with proof of the approval of the board of county commissioners of said county for such cancellation, as contemplated by said Chapter 23345, he shall continue to hold such securities in the manner prescribed by said Chapter 16482.

(2) If such request is made and such approval is evidenced, it is suggested the state treasurer shall deal with such request as follows:

(a) Upon proof that such securities in each instance were accepted solely in redemption or payment of taxes imposed for application to such securities so accepted, he may deliver them for cancellation, subject to the condition set forth in subparagraph (c) below.

(b) If such securities were accepted in payment of taxes other than taxes levied for the taxing unit issuing such securities, upon evidence showing there has been an adjustment of accounts, between the several taxing units interested in said securities, he may deliver them for cancellation, subject to the condition set forth in subparagraph (c) below. Any such adjustment of accounts should result in each such unit receiving the same tax benefit as though said securities had been paid and the proceeds thereof distributed in the proportion that each of said units had an interest therein, as fixed by Section 3 of said Chapter 16482.

(c) That unless there shall be evidenced to the state treasurer the facts in either (a) or (b) above, he will be justified in refusing to deliver such securities for cancellation.

(d) In any event, before delivery of such road and bridge bonds and coupons, among such securities, the state treasurer shall make known the facts of such request for cancellation to the state board of administration and obtain the approval of that board for delivery thereof.

October 23, 1946.—046-438.

BANKING—SAFEKEEPING RECEIPT—FORM

QUESTION: Section 18-11 (2), Florida Statutes, 1941, sets forth the form of safekeeping receipt which may be accepted by the state treasurer from a bank (as therein described) which accepts and holds for safekeeping securities pledged by a depositing bank to secure deposits of state funds in the latter bank. At the time the form was so provided (by Chapter 20938, Laws of Florida, Acts of 1941), it was substantially the form used by the member banks of this Federal Reserve District. The Federal Reserve Bank of Atlanta, by Operating Circular No. 20, dated September 1, 1946, provided for a receipt which by reference makes the terms and conditions set forth in Operating Circular No. 20 a part thereof, and which receipt now so provided is different from the form of receipt set forth in said Section 18.11(2). Is the form of receipt provided by the Federal Reserve Bank of Atlanta a receipt which substantially complies with the "form and provisions" of the safekeeping receipt provided by said Section 18.11 (2)?

To Honorable J. Edwin Larson, State Treasurer:

Section 18.11 (2), Florida Statutes, 1941, provides, in effect, that in lieu of the actual depositing of securities by a bank in which is deposited state money, the state treasurer may accept a safekeeping receipt issued by a bank of the type therein described, and that such receipt "shall substantially comply with the following form and provisions, to wit:"—and immediately thereafter such form is set forth in said statute. Given its ordinary meaning, "substantially" means, in a substantial manner or way; really, solidly, competently; and as applied to an instrument, means not an accurate or exact copy but one which contains the substance of the instrument copied. *Edgerton v. State (Tex.)*, 70 S.W. 90; *Western Assurance Co. v. Alzheimer*, 58 Ark. 565, 25 S.W. 1067. Thus, "substantially" goes to the matter of substance as distinguished from that of mere form. *Cain v. Osler*, 16 Ia. 59, 150 N.W. 17. But the statute under consideration here provides for a receipt substantially complying both as to **form** and **provisions** (substance) with that set forth therein. The word "form" as commonly used is the antithesis of "substance." *Phoenix Building & Homestead Association v. Meraux*, 198 La. 819, 180 So. 648. *State v. Japone*, 202 Ia. 450, 20 N.W. 468. Since the statute requires a substantial compliance with form as well as provisions, we assume the legislature did not intend that the words "form" and "provisions" as used in said law should be construed as similar in meaning and import, particularly in view of the recognized opposite meaning of such words. Where a statute prescribes that an instrument shall be in substantially a certain form, "substantially" does not mean an exact copy of such form but a fair copy thereof or nearly so. *Corn v. Cohen*, 49 N.Y.S. 2d. 913, 914.

For the reasons set forth above, in my opinion the above question properly is answered as follows:

That the new form of safekeeping receipt provided by the Federal Reserve Bank of Atlanta in pursuance of its Operating Circular No. 20, dated September 1, 1946, is not such a form of receipt which substantially complies with the form and provisions of the safekeeping receipt required by Section 18.11 (2), Florida Statutes, 1941.

July 9, 1945.—045-179.

STATE AGENCY RECEIPTS—DEPOSIT IN TREASURY

QUESTION: 1. When did Chapter 22833, Acts of 1945, become a law?

2. May the Board of Medical Examiners deduct its expenses from its receipts and transmit the remainder to the state treasurer, or must all receipts be transmitted and requisition made for the board's expenses?

To Dr. J. C. Davis, Member of the State Board of Medical Examiners, Quincy, Florida:

Section 9 of Chapter 22833 reads as follows:

"This Act shall take effect immediately upon becoming a law except that the five funds herein created shall become operative as of midnight June 30, 1945."

This act became a law on June 11.

Except as to division of funds in the state treasury into five funds as set up in the act, the law became effective on June 11. In other words, the requirement for the deposit of all funds in the state treasury became effective on June 11.

The act requires that all funds received by your board shall be promptly deposited in the state treasury. The board may not deduct its expenses or make any other deductions. Any proper expense of the board is reimbursed upon requisition on the state comptroller. The comptroller will furnish you with form of requisition upon your request.

June 29, 1945.—045-165.

WARRANTS DRAWN AGAINST FUND CLASSIFICATIONS

QUESTION: May warrants drawn against present fund classifications, which will be presented for payment on and after July 1, 1945, be paid out of the five funds into which the present funds in the treasury will be converted under the provisions of Chapter 22833, Acts of 1945?

To Honorable J. Edwin Larson, State Treasurer:

In my opinion, after a careful reading of the act, your question presents a contingency which need not necessarily arise in the administration of the act.

Section 9 of Chapter 22833, Acts of 1945, provides that the act shall take effect upon becoming a law except that the five funds created by the act shall become operative as of midnight June 30, 1945.

Section 2 provides that from and after the effective date of the act all revenue from the sources mentioned in said section shall be deposited in the state treasury, and immediately credited to the appropriate fund as in said act provided. It is evident, therefore, that the "effective date" of the act refers to the date the five funds "became operative," to wit, midnight June 30, 1945, and not to the date the act became a law.

Section 4 of the act provides that the treasurer and the comptroller shall, prior to "the effective date" of the act (again this refers to midnight of June 30, 1945), make a complete analysis of the moneys in the state treasury and shall compile a complete statement of the funds in the state treasury and a list of the moneys that should "properly be transferred" to the five funds designated in the act, which shall be submitted to the governor, and the moneys "properly belonging to each of the five funds" as in said act provided shall be transferred to the proper fund at the close of business on June 30, 1945, which I take to mean 1 P. M., June 30, 1945.

It is the clear legislative intent that the five funds should become operative as of midnight, June 30, 1945, and the moneys comprising such funds should come from two sources, first revenues collected or received from and after midnight, June 30, 1945, and second, moneys "properly belonging to each of the five funds," and transferred to the proper fund as of the close of business on June 30, 1945.

The proper administration of the act depends on the interpretation of the words "monies properly belonging to each of the five funds," which the act provides shall be transferred to the proper fund as of the close of business at 1 P. M. on Saturday, June 30, 1945.

I construe the expression "monies properly belonging to each of the five funds," to be the net balances in each of the funds in the present fund classification, which is the actual cash balance in each of the funds in the present fund classification as of 1 P. M., June 30, 1945, less outstanding warrants previously drawn against such funds but not presented and paid by the time mentioned. This will mean that the funds as they are now set up will embrace funds retained to pay outstanding warrants, and the five new funds will be subject only to warrants drawn against such newly created funds subsequent to midnight, June 30, 1945.

If the act is administered according to this interpretation, there will be no warrants outstanding payable out of the newly created five funds, subsequent to making the transfer of moneys "properly belonging" to such funds, as of midnight, June 30, 1945, as are retained in the old funds sufficient to pay the warrants drawn against them.

STATE AUDITING DEPARTMENT

August 29, 1946.—046-363.

UNEXPENDED BALANCE—USE OF FUNDS

QUESTION: May any balance of the annual continuing appropriation provided for the State Auditing Department by Section 21.12 of the statutes remaining unexpended at the end of the first year of the present biennium be used for expenses of the department during this, the second year of the biennium?

To Honorable Bryan Willis, State Auditing Department:

You add that ten of the auditors were in military service and not discharged until part of the biennium had expired, resulting in a balance in the appropriation provided by Section 21.12 of the statutes but that these auditors have now returned from service and unless the unexpended balance at the end of the first year is available the operations of the department will have to be curtailed before the end of the biennium.

Section 21.12 appropriates annually for the department, \$68,600 for salaries and expenses. The General Appropriation Act of 1945, Item 14, appropriates for the department, \$120,640 "supplemented by Section 21.12, \$68,600."

Section 8 of Chapter 22827 provides that any money appropriated by that act for the first year of the biennium or any remaining balance thereof not used in the first year of the biennium and not contracted to be expended may be used for a like purpose in the second year of the biennium.

In view of the manner in which the appropriation was made in the General Appropriation Act, I am convinced that it was the intention of the legislature that Section 8 of the General Appropriation Act should apply to the money appropriated by Section 21.12 as well as to that appropriated by Item 14 of the General Appropriation Act, and that, therefore, all money appropriated either by Section 21.12 or by Item 14 of the General Appropriation Act for the first year of the biennium remaining unexpended and not contracted to be expended at the end of the first year may be used in the second year of the biennium.

CHAPTER V

JUDICIARY DEPARTMENT

CIRCUIT COURTS, CIRCUITS, JUDGES

July 31, 1945.—045-218.

CIRCUIT JUDGES—SALARIES

QUESTION: Section 1, Chapter 22546, Acts of 1945, provides that beginning July 1st, 1945, the annual salaries of the circuit judges of the state shall be \$7,500.00. Section 2 of this act provides:

"Any member of the legislature who may during the time for which he was elected senator or member of the house of representatives, be appointed or elected to a civil office referred to in Section 5, Article III of the Constitution shall receive during the term for which he was elected or appointed to such civil office the salary or emoluments which under the provisions of law appertain to such office at the beginning of the time for which he was elected senator or member of the house of representatives."

Chapter 21760, Acts of 1943, increased the annual salaries of circuit judges from \$5,000.00 to \$65,000.00. This chapter has the identical Section 2 that the 1945 Act has.

One of the circuit judges was a member of the 1943 Legislature and was appointed by the governor. His term expires in January, 1949.

What salary is this judge entitled to receive after July 1st, 1945 under the above law?

To Honorable J. M. Lee, State Comptroller:

In reply to your inquiry I beg leave to state that if the facts as I understand them are that the judge mentioned was a member of the legislature and that while he was such member he was appointed to the office of circuit judge, which office was created by the session of the legislature in which he was serving, or if the compensation was changed during that session of the legislature, it would appear that your inquiry comes within the language of the advisory opinion to the governor, 22 So. 2d. 458, et seq., and that for that reason the judge in question was neither eligible for appointment, nor entitled to the increased salary.

STATE ATTORNEY; POWERS, DUTIES, ETC.

June 8, 1945.—045-142.

GOVERNOR—ACTING ASSISTANT STATE ATTORNEY— APPOINTMENT

QUESTION: Has the governor authority to appoint an acting assistant state attorneys?

To Honorable Millard F. Caldwell, Governor:

I understand that there is no question involving leave of absence for military service.

In my opinion the above question must be answered in the negative as I find no law empowering the governor to appoint acting assistant state attorneys.

August 13, 1945.—045-237.

ASSISTANT—AUTHORITY AS TO REQUISITION FOR EXTRADITION

QUESTION: Does an assistant state attorney come within the class of officers who may present to the governor a written application for a requisition for the return to this state of a person charged with crime?

To Honorable George A. DeCottes, Assistant State Attorney, Sanford, Florida:

Section 941.23, Florida Statutes, 1941, provides that when the return to this state of a person charged with crime in this state as required, the "baliff or state attorney or county solicitor or other prosecuting attorney" shall present to the governor his written application for a requisition for the return of the person charged.

Section 27.21, Florida Statutes, 1941, provides that in all judicial circuits having a population of less than 192,000, the assistant state attorneys are "vested with all the powers and shall discharge all the duties of the state attorney." Section 27.22, Florida Statutes, 1941, provides that in all judicial circuits having a population of more than 192,000, the assistant state attorneys are "vested with all the powers and shall discharge all the duties of the state attorney, under his direction."

It would appear to be immaterial whether the population of your circuit is more or less than 192,000 because both Sections 27.21 and 27.22 provide that assistant state attorneys are "vested with all the powers and shall discharge all the duties of the state attorney." In my opinion this language authorizes an assistant state attorney to make the application for requisition contemplated by Section 941.23.

Because of constitutional inhibitions against the filing of informations by assistant state attorneys, this opinion is not to be construed as holding that Sections 27.21 and 27.22 confer such power on assistant state attorneys. See *State ex rel Ricks v. Davidson*, 163 So. 588.

CLERKS OF THE CIRCUIT COURT

July 30, 1945.—045-206.

FEE IN CRIMINAL CASES

QUESTION: A criminal case is certified to the circuit court by the county judge. Upon investigation the state attorney does not find sufficient evidence upon which to file information and in open court announces this fact to the circuit judge. The case is not docketed by the clerk of the circuit court and the only service rendered by the clerk is to enter the style of the case in the minutes of the court's record and record there the fact of "no information filed." Leon county has a flat fee of \$10.00 per case. Is the clerk of the circuit court entitled to such fee under such circumstances?

To Honorable George C. Crawford, Clerk of the Circuit Court, Leon County, Tallahassee, Florida:

I am unable to find any statute which provides for the allowance of such a fee to the clerk for the services mentioned.

June 18, 1945.—045-157.

STATE CENSUS OF 1945—EFFECTIVE DATE—FEES

QUESTION: Chapter 21009, Acts of 1941, provides for a \$12.50 filing fee on all divorce cases instituted in counties having a population of more than 250,000. Apparently the recent state census brings Duval county under this law. When does the law officially take effect in Duval county?

To Honorable Leonard W. Thomas, Clerk of the Circuit Court, Duval County, Jacksonville, Florida:

Chapter 22515, (Senate Bill No. 1) Acts of Florida, 1945, which is the act providing for the taking of the census of the State of Florida for 1945, and making appropriation therefor, says:

"When the returns are made, the commissioner of agriculture shall cause same to be classified and arranged in the best and most convenient form for use, and lay the same before the legislature at its 1945 session: and the certificate of the commissioner of agriculture certifying the population as enumerated by the said enumerator for any county or counties shall be the official census for the county or counties so certified."

The statute does not fix a definite date when this 1945 state census shall become effective.

The commissioner of agriculture made his certificate in accordance with the above section on June 11, 1945.

In my opinion this date, June 11, 1945, is the effective date of the said census.

"Since publication of census is to be under secretary of state's certificate, date of certificate determines when census becomes effective (Code 1924, §§ 421, 423-426, 428, 429)."

"Where secretary of state did not certify 1925 census of Iowa until February 1, 1926, census did not become effective until such date (Code 1924, §§ 421, 423-426, 428, 429)."

Broyles v. Mahaska County,
November 17, 1931
239 N. W. 1.

"In the absence of a statute requiring any formal action by the Census Board or the Legislature, a census goes into legal effect, as such, on its compilation and publication by the census superintendent or board."

14 C. J. S., Census,
Paragraph 6, page 103.

I appreciate the fact that this question is a perplexing one and has caused some difference of opinion among our courts.

One of my predecessors in an opinion rendered on September 24, 1940, as to when the effective date of the 1940 federal census should apply, held that the said census became effective on the first day of April, 1940, the date it became the duty of each enumerator of the said census to commence the enumeration of such census in his district, and cited as his authority the case of Underwood vs. Hickman, 39 S. W. 2d. 1034, 162 Tennessee 689.

In the Underwood case it is there stated that the United States Statute, under which the census was taken, provided that the census should be taken "as of the first day of April 1930." Chapter 22515, Acts of Florida, 1945, providing for our 1945 State Census does not have this provision. Furthermore, the Underwood case does not seem to follow the majority of our Courts in construing this question. 14 C. J. S., Census, Paragraph 6, Page 103, Notes 28, 29 and 30.

June 28, 1945.—045-176.

RECORDING DISCHARGES—PAYMENT

QUESTION: 1. What is the fee for recording discharges from World War II and who pays the fee?

2. What is the fee for making certified copies of discharges and who pays the fee?

3. What is the fee for making certified copies of final decrees in divorce suits and who pays the fee?

4. What is the fee for recording Army and Navy separation qualification records and who pays the fee?

To Honorable W. G. Jones, Acting Clerk of Circuit Court, Dixie County, Cross City, Florida:

Section 28.18, Florida Statutes, 1941, as amended in 1943, provides that the clerk shall receive a fee not to exceed 25c for recording each certificate of discharge and that same is to be paid by the board of county commissioners.

The clerk's fee for making certified copies of discharges would be 25c for the first one hundred words and 12½c for each additional one hundred words and fractions thereof. This is to be paid by the person ordering the same.

The clerk's fee for certified copies of final decree of divorce is the same as set out in answer to your second question, and, again, it is to be paid by the person requiring the same. Under Section 382.25, Florida Statutes, 1941, you are required to prepare certain data for the Bureau of Vital Statistics relating to divorce decrees, for which you are to receive 25c, which is to be taxed as part of the costs in the case.

As I understand it, the Army and Navy separation qualification record covers certain information about the soldier or sailor and his qualifications and is not a part of the certificate of discharge. I find no statute authorizing or requiring the recording of such paper or allowing any fee for same.

April 15, 1946.—046-157.

VETERANS—RECORDING CHARGES

QUESTIONS: 1. Should the discharges of veterans be recorded free of cost to them?

2. Some clerks of the circuit court in various counties of Florida make charge for certified copies of discharges to veterans even though these copies are to be used in filing claims with the Veterans Administration. Is this legal?

3. Some of the county judges of the State make charges to veterans for certified copies of public records, marriages, and divorces in their respective counties. Is this legal?

To Honorable M. E. Penton, Assistant State Service Officer, St. Petersburg, Florida:

In answer to your first question, Section 28.18, Florida Statutes, 1941, as amended by the laws of 1943, says:

"All such certificates of discharge shall be recorded free of any cost whatsoever to the respective discharged soldier, sailor or other member of military or naval force of the United States."

It is, therefore, not legal for the clerks to charge the veterans any costs for recording such discharges. The boards of county commissioners pay for same, which is twenty-five cents for each certificate.

Answering your second question, Section 293.15, Florida Statutes, 1941, says:

"Whenever a copy of any public record is required by the bureau to be used in determining the eligibility of any person to participate in benefits made available by such bureau, the official charged with the custody of such public record shall, without charge, provide the applicant for such benefits, or any person acting on his behalf, or the representative of such bureau, with a certified copy of such record."

Agreeable to this law, it is the duty of the clerks of the circuit court to provide the bureau with certified copies of records required by it for determining the eligibility of any person to participate in benefits made available by such bureau; however, I think the clerk is entitled to know and be furnished with the official request by the bureau stating that the same is required by it for the purpose of determining the eligibility of such person.

Answering your third question, I know of no law which makes it the duty of the county judges to furnish without charge to veterans certified copies of public records, marriages and divorces in their respective counties, unless and except the same shall be necessary by the veterans bureau to be used in determining the eligibility of any such veteran to participate in benefits made available by such bureau. In that event I think it would be the duty of the veterans bureau to make it known to such officer in some manner that the said records are to be used for this purpose and that alone.
August 18, 1945.—045-243.

VETERANS—CERTIFICATES OF SEPARATION—RECORDING

QUESTION: Is there any statute authorizing or requiring the recording of a paper entitled "Certificate of Separation"?

To Honorable Ted Cabot, Clerk of the Circuit Court, Broward County, Fort Lauderdale, Florida:

On June 28, 1945, I rendered an opinion on this question in which I stated:

"As I understand it, the Army and Navy separation qualification record covers certain information about the soldier or sailor and his qualifications and is not a part of the certificate of discharge. I find no statute authorizing or requiring the recording of such paper or allowing any fee for same."

I trust that this is the information desired.

September 4, 1945.—045-278.

RECORDING DEED—POST-OFFICE ADDRESS OF GRANTEE

QUESTION: If "X," a real estate broker, presents for recordation a deed naming "Y," who resides in a northern city, as grantee, and if "X" refuses to give any address for "Y" except in care of "X" (himself) at a given box number in a Florida town, can the clerk of the circuit court refuse to record the deed as not complying with Section 1, Chapter 23114, Acts of 1945?

*To Honorable Ted Cabot, Clerk of the Circuit Court, Broward County,
Ft. Lauderdale, Florida:*

Section 1 of the said act says:

"After October 1, 1945, it shall be the duty of the several clerks of the circuit courts to ascertain of all persons presenting for public record any instrument other than mortgages conveying or purporting to convey any interest in real estate the correct post office address of the grantee or grantees named in such instrument, and it shall be the duty of the person presenting such instrument for recordation to furnish such information to said official."

As I said in a former opinion, I feel sure that it was the intention of the legislature in the enactment of this law to require such specific address of the grantee in order that mail addressed to him would be as nearly certain of delivery as possible.

The law does not set out how the clerk shall ascertain the correct post-office address of the grantee, and neither does it state how much information shall be given the clerk to convince that official as to what is the correct address of the grantee. In other words, these things are left to the judgment of the clerk.

After you have gotten all the facts in connection with this matter and you are convinced that this is the correct post-office address of the grantee you should record the deed.

If you decide that this is not the correct address of the grantee, then you can refuse to record the deed until the correct post-office address is given you, for, in my opinion, the legislature in giving to the clerk the duty of ascertaining the correct post-office address of the grantee has made such knowledge a condition precedent to the recording of the deed.

September 20, 1945.—045-294.

HABEAS CORPUS—COSTS

QUESTION: Who is responsible for clerk's costs incurred in connection with a proceeding in habeas corpus to determine the right to custody of a minor child?

To Honorable J. M. Lee, State Comptroller:

It appears from your file in this connection that the habeas corpus proceeding in question was brought by residents of Michigan against persons in this state. The purpose of the proceeding appears to have been to determine the right to the custody of the child.

A habeas corpus proceeding is an independent original suit, civil rather than criminal in its nature and a legal remedy instead of equitable. (Fredrick v. Rowe, 105 Fla. 193, 140 So. 915; Deed v. Fabisinski, 111 Fla. 454, 152 So. 207; 39 C. J. S. 426, section 1; and 25 Am. Jur. 151, Section 12). A proceeding in habeas corpus to determine the right to custody of a child is in material respects an action, civil in its nature, partaking of the nature of a private suit, in which the public primarily has no concern (Tillman v. Walters, 214 Ala. 71, 108 So. 62). In such proceedings the real issue is one between private parties contesting a question of private right in which there arises no question of personal liberty. (In re Hamilton, 66 Kan. 754, 71 P. 817).

The proceeding in question being in the nature of a civil legal remedy, partaking of the nature of a private suit, the usual procedure followed in other civil suits regarding the allowance and liability for costs is applicable. The court, in proceedings in habeas corpus to determine the

custody of children, may direct the awarding of costs and may even award costs against the successful party. (39 C. J. S. 703, Section 106). The proceeding in question having been brought by nonresidents, Section 58.01, Florida Statutes, 1941, may be applicable. Usually the liability of the state or county for costs in habeas corpus proceedings is dependent upon statute (39 C. J. S. 703, Section 106). I know of no statute making either the state or county liable for costs in habeas corpus proceedings involving the custody of children as between two or more claimants.

I am, therefore, of the opinion that the clerk's deposit for costs in habeas corpus proceedings to determine the custody of children should be paid in the first instance by the party seeking the writ, as in other civil cases, and that the court may award costs in such proceedings as in other cases. The state is usually not the party seeking the writ although the cause may be entitled in the name of the state.

August 1, 1945.—045-210.

COMPENSATION FOR DISBURSEMENT OF MONEY IN COURT REGISTRY

QUESTION: One condemnation suit is brought for rights of way. One judgment was entered vesting in the State of Florida the fee simple title to seven separate tracts of land, each owned by a separate owner. The total amount of the award, including compensation, witness fees and attorneys' fees, adjudged by the court, was paid into the registry of the court.

Should the clerk's compensation of the amount of the money so placed in the registry of the court be computed upon the total amount disbursed, or should it be computed upon each separate disbursement made?

To Honorable F. E. Bayless, Chairman, State Road Department:

Chapter 28.24, Florida Statutes, 1941, says:

"The compensation of the clerk . . . shall be as follows: . . .

Moneys, receiving into registry, and paying out first \$500.00,	per cent	1
Each subsequent \$100.00, per cent		1/2"

Inasmuch as the money was paid into the registry of the court in one suit and in one judgment, in my opinion, the clerk's fee should be computed upon the total amount received and disbursed (including sums received and disbursed as witness fees and guardian ad litem fees) and not upon each separate disbursement when made. The mere fact that there were several defendants and the money was paid out to each defendant should not, in my opinion, control the compensation of the clerk.

SHERIFFS

June 29, 1946.—046-282.

MILEAGE—ROUND TRIP

QUESTION: In conveying a prisoner to the industrial schools for boys and girls, is a three-way mileage charged or a two-way mileage charged by the sheriff for transporting the prisoner?

To Honorable Frank Morris, Sheriff, Citrus County, Inverness, Florida:

Section 30.23, Florida Statutes, 1941, as amended by the 1945 Legislature, says:

"State Hospital and Industrial Schools for Boys and Girls . . . mileage per mile each way . . . 12 1/2c, provided transportation is not furnished by the State or State Institution to which the prisoner should be conveyed."

In my opinion, this means that when you convey a prisoner to the industrial schools for boys and girls, and the round trip, for example, is one hundred miles, your charge for mileage would be \$12.50.

May 4, 1946.—046-189.

SHERIFF'S FEES—LIBERTY COUNTY

QUESTION: In 1941 the legislature passed Chapter 20643, being a special law for Liberty county, Florida, and provided therein that the sheriff should receive a salary of five hundred dollars per month in lieu of other fees. May the sheriff who has accepted the provisions of this special act, charge additional fees for the handling of delinquent children in bringing them into court and transporting them to Ocala and Marianna, also for attending inquests and summoning witnesses at such inquests?

To Honorable Clyde W. Atkinson, Tallahassee, Florida:

Section 2 of said Chapter 20643, reads as follows:

"That the sheriff of Liberty county, Florida shall receive the sum of six thousand (\$6,000.00) dollars per annum, payable in twelve monthly instalments of five hundred (\$500.00) dollars each to be paid by warrants drawn by the board of county commissioners of Liberty county, Florida, upon the fine and forfeiture fund of such county, for his services as sheriff of said county, which said sum shall be in lieu of any and all other fees except for feeding prisoners and except for making trips outside of the State of Florida; that he shall receive in addition to the above mentioned compensation the fees for feeding prisoners as is provided for by general law and that in addition thereto he shall be paid for bringing prisoners back to Liberty county from any point outside of the State of Florida as is provided for by the general law."

I think the law is clear and it is my opinion that the sheriff cannot charge additional fees for the above services.

November 1, 1946.—046-460.

FEES—LIBERTY COUNTY—GUARDS

QUESTIONS: 1. Is the sheriff of Liberty county entitled to reimbursement for guards and servants as provided by Section 30.23, Florida Statutes, 1941, as amended?

2. Is the sheriff of Liberty county entitled to costs for delivery of patients to the state hospital, and of boys and girls to the state industrial schools as provided by Section 30.23, Florida Statutes, 1941?

3. Is the sheriff of Liberty county entitled to costs provided by law for sheriffs in general for services performed in the holding of inquests?

4. Is the sheriff of Liberty county entitled to reimbursement for costs paid by him to sheriffs of other counties for services performed by them?

To Honorable S. G. Revell, Sheriff, Liberty County, Bristol, Florida:

Chapter 20643, Laws of 1941, says:

"Section 2. That the sheriff of Liberty county, Florida shall receive the sum of six thousand (\$6,000.00) dollars per annum, payable in twelve monthly instalments of five hundred (\$500.00) dollars each to be paid by warrants drawn by the board of county commissioners of Liberty county, Florida, upon the fine and forfeiture fund of such county for his services as sheriff of said county, which said sum shall be in lieu of any and all other fees except for feeding prisoners and except for making trips outside of the State of Florida; that he shall receive in addition to the above mentioned compensation the fees for feeding prisoners as is provided for by general law and that in addition thereto he shall be paid for bringing prisoners back to Liberty county from any point outside of the State of Florida as is provided for by the general law." (Emphasis supplied).

I do not attempt to pass upon the constitutionality of this act.

It seems to me that it was the clear intent of the legislature by this chapter to restrict the sheriff's fees to \$6,000.00 per year. I, therefore, answer all four questions in the negative, except to say that if guards are necessary to the due enforcement of law in Liberty county and the county commissioners of that county approve of the hiring of such guards by the sheriff, then the cost of such guards would be a legitimate expense of such county.

February 18, 1946.—046-61.

MILEAGE COSTS

QUESTIONS: 1. "In the event I sent a warrant from my county to a distant county within the state and the sheriff makes the arrest, wires me he has received the warrant and made the arrest and party is unable to make bond and for me to come and get him; between the time of me leaving my county and my arrival to the other county the defendant has made bond and has been released by the sheriff and on my arrival I get the bond instead of the prisoner, am I entitled to mileage going and returning where it was done in good faith and none constructive or is it a dead loss to me?"

2. "In the event I went to a distant county within the state taking with me a warrant for the arrest of any one and there delivering warrant to sheriff of that county who makes the arrest and the party arrested makes bond, am I entitled to mileage going and coming where it is done in good faith and none constructive?"

To Honorable C. M. Hand, Sheriff, Seminole County, Sanford, Florida:

It is my opinion, in answer to your question numbered 1, that you would be entitled to your mileage. I do not see where it would be right, proper or just to deny you your mileage under these conditions.

As to question numbered 2, this should be answered no. The sheriff of the county where the prisoner is found has the authority and it is his duty to accept the bond (ex parte Hatcher, 98 So. 72) and there is no reason or excuse why you should personally take the warrant and thus, under these conditions, incur any mileage cost.

January 22, 1946.—046-25.

COST CHARGES BY CITY POLICE

QUESTIONS: 1. "Can the sheriff properly pay to the city of St. Augustine, cost charges made by the police department for prisoners turned over to the sheriff for prosecution in the county?"

2. "Can the sheriff bill the county for reimbursement of costs assessed by the police department and paid by the sheriff? Is the county obligated to pay such costs?"

To Honorable J. T. Shepherd, Sheriff, St. Johns County, St. Augustine, Florida:

I assume that there is no special law covering this matter. If my assumption is correct, both of these questions should be answered in the negative as I know of no law relative to such procedure.

October 8, 1945.—045-314.

TRANSPORTATION OF PRISONERS—SHERIFFS' FEES

QUESTION: A negro was tried, convicted and sentenced by your circuit court for a term of three years at the state prison at Raiford. Before being turned over to the state authorities he escaped from the county jail. This negro was apprehended in the State of Virginia and was by you returned to the jail in Jackson county. You desire to know who is responsible for the payment of your bill for these services, the County of Jackson or the State of Florida?

To Honorable W. B. Gause, Sheriff, Jackson County, Marianna, Florida:

Until transferred to the state prison a convict is in the legal custody of the sheriff. Section 922.01, Florida Statutes, 1941, and *Murray vs. State*, 6 So. 498.

Section 30.24, Florida Statutes, 1941, says:

"The sheriffs of the several counties, when required to go beyond the limits of this state to bring back a prisoner charged with any offense, or who has been convicted of any crime in this state, and has escaped, shall charge the sum of seven cents per mile for the actual distance traveled beyond the limits of this state, together with the same mileage for his prisoner, and in addition thereto he shall receive the actual and necessary expense on account of returning the prisoner to the State of Florida."

The case of *Davis vs. Keen*, 192 So. 200, which construes this section, says:

"Section 4591, C. G. L. (Section 30.24, Florida Statutes, 1941) makes it the duty of the sheriffs of the several counties of Florida to return prisoners charged with a violation of the criminal laws of Florida and prescribes compensation therefor. Subsection 12 of Section 2153, C. G. L., (Section 125.01, Florida Statutes, 1941) makes it the duty of the Boards of County Commissioners to approve or disapprove, audit and pay the claims against a county."

It is my opinion that the claim is one against the County of Jackson and not against the State of Florida.

September 13, 1945.—045-298.

FEEES FOR COMMITMENT, RELEASE, ETC.

QUESTIONS: 1. Is the sheriff entitled to bill the county for \$1.50 for commitment fee and \$.50 for release fee where the constable turns the prisoner over to the jailor, a deputy sheriff, or is the constable entitled to the commitment fee and the sheriff the release fee?

2. Where the constable turns a prisoner over to the jailor and the sheriff takes fingerprints and bills the county therefor, is the constable allowed to bill the county for fingerprinting the prisoner thereafter?

3. Is it proper for the sheriff to collect fines and costs against a prisoner before he has been committed or recommitted? If such fines and costs are collected by the sheriff before the prisoner is committed, can he properly charge 5 per cent for the handling of said fines and costs?

To Honorable J. T. Shepherd, Sheriff, St. Johns County, St. Augustine, Florida:

1. One of my predecessors on July 21, 1934, rendered an opinion upon a similar question, as follows:

"When a constable brings a prisoner to a jail for receipt and safekeeping, and when, under order of the court, a constable returns to the jail to secure the release of a prisoner, a constable and not the sheriff would be entitled to the commitment or the release fee, as the case may be."

On March 17, 1945, I rendered an opinion in which I stated:

"The constable is entitled to the commitment fee when he commits to jail a prisoner arrested by him."

and

"If a constable has a prisoner in his actual custody at the time the prisoner is released, I am of the opinion that the constable is entitled to the release fee."

2. Section 30.31, Florida Statutes, 1941, (Laws of 1943, Chapter 22047), says:

"It is hereby made the duty of the sheriffs of the State of Florida when, in their opinion, it is necessary for them to protect the public to fingerprint all persons charged with or convicted of any criminal offense."

I do not find where it is the duty of the constable to fingerprint any criminal. I am aware that Chapter 22587, Acts of 1945, which is an act fixing the fees to be charged by the sheriffs and constables of the several counties, says:

"Fingerprinting of each prisoner.....\$1.00."

In my opinion, when the sheriff, in accordance with the statute, fingerprints criminals, he is entitled to the fee and the mere fact that the constable afterwards fingerprints the criminal would not entitle the constable to a fee for his services. The legislature does not contemplate paying two officers for the same services.

3. Section 922.01, Florida Statutes, 1941, says:

"Upon pronouncement of a sentence imposing a penalty **other than a fine only or death** the court shall forthwith commit the defendant to the custody of the sheriff together with a certified copy of the sentence." (Emphasis supplied).

It is my opinion that where a sentence imposing a penalty other than a fine only is imposed by the court, it is not necessary that a formal commitment, which is only a process for enforcing payment thereof, be issued to the sheriff and that officer can collect the fine and when he does so he is entitled to the five per cent commission as allowed by Chapter 22587, Laws of Florida, 1945.

December 30, 1946.—046-524.

JAIL GUARDS—COMPENSATION

QUESTION: Is a sheriff entitled to pay for servant at jail even though he lives and resides in the jail himself, also is he entitled to pay for guard at the jail under the same conditions?

To Honorable Sidney C. Edwards, Clerk to Board of County Commissioners, LaFayette County, Mayo, Florida:

I am handing you herein three opinions written by this office, all bearing upon this subject and you will note therein that the Supreme Court of Florida in the case of *Brown v. St. Lucie County*, 153 So. 906, has spoken on this question and said in effect that the rule as to the hiring of such servant and guard is that such guard must be employed for the proper protection and management of the county jail, the employment must be in the exercise of the sheriff's fair and honest judgment based upon a real necessity and the amount billed against the county must have actually been paid by the sheriff to such guard, and must not be in excess of the amount allowed under the statute; that the same requirements are applicable to the servant employed by the sheriff for the county jail.

Of course, such a servant is not hired for the personal use of the sheriff but in order to keep the jail in proper shape, which is county property. Furthermore, the guard must be necessary for the protection of the prisoners who might be incarcerated in the jail.

The mere fact that the sheriff lives in the jail would not of itself determine whether or not the necessity of such servant or guard exists, but the necessity, as said before, must exist.

I trust this will answer your question.

September 20, 1945.—045-295.

GUARDS—EMPLOYMENT AND FEES

QUESTION: Chapter 22587, Laws of Florida, 1945, prescribes the fees to be charged by sheriffs and includes the following items: "Guards, not more per day than \$5.00." Can the sheriff hire a day jailor and a night jailor, and, if he does so, can this \$5.00 be applied to their salaries "for two shifts a day"?

To Honorable H. I. Enzor, Sheriff, Okaloosa County, Crestview, Florida:

There is no provision in the law for the payment of the services of a jailor.

If, however, guards are necessary, for the protection and management of the county jail and the safekeeping of the prisoners therein, the Supreme Court of Florida held in *Brown vs. St. Lucie County*, 153 So. 906:

"that where a sheriff, in the exercise of his fair and honest judgment, based upon a real necessity, employs guards deemed by him to be essential for the proper protection and management of the county jail, he is entitled to claim, and have paid by the County, reimbursement at the statutory rate for his actual outlay.

"In cases where the sheriff's employment of a guard comes within the rule laid down in said case so as to entitle him to reimbursement for his outlay, he can recover no more than the amount actually paid such guard. . . ."

I trust this answers your question.

March 7, 1945.—045-63.

GUARDS—EMPLOYMENT, FEES

QUESTION: Is the sheriff entitled to collect from the county \$2.00 per day for a guard at the jail?

To Honorable J. L. Baggett, Sheriff of Dixie County, Cross City, Florida:

Section 30.23, Florida Statutes, 1941, prescribes the fees to be charged by sheriffs and includes the following item:

"Guards, not more per day than \$2.00."

In construing this statutory provision, the Supreme Court of Florida held, in *Brown vs. St. Lucie County*, 153 So. 906, that where a sheriff in the exercise of his fair and honest judgment, based upon a real necessity, employs guards deemed by him to be essential for the proper protection and management of the county jail, he is entitled to claim, and have paid by the county, reimbursement at the statutory rate for his actual outlay.

In cases where the sheriff's employment of a guard comes within the rule laid down in said case so as to entitle him to reimbursement for his outlay, he can recover no more than the amount actually paid such guard, not in excess of \$2.00 per day.

August 27, 1945.—045-263.

FEES—AUTHORIZED EXPENDITURES

QUESTION: Under an act of the 1945 Legislature, Section 30.23, Florida Statutes, 1941, was amended and the fees of the sheriffs increased. Among the items of expenditures authorized under this act is "as much as \$5.00" per day for a "Jailor." Also for "servants, not more per day than \$1.00." May such items be paid to the sheriff by the county commissioners?

To Honorable Wilbur W. Whitehurst, County Attorney, Wauchula, Florida:

The compensation of the sheriffs is now provided by Chapter 22587, Acts of 1945.

I do not find therein any provision for the payment of \$5.00 charged by the sheriff for the services of a jailor.

As to the fee for the servant, said Chapter 22587 says:

"Servants, not more per day than \$3.00."

Under the rule laid down by the Supreme Court of Florida in the case of *Brown v. St. Lucie County*, 153 So. page 906, the sheriff is entitled to be compensated for said servant:

"When the sheriff . . . in the exercise of his honest judgment based upon the fair necessity therefor employs . . . servants in connection with the county jail, which is county property, and which the law requires him to manage and look out for. The county shall thereby become liable to him for reimbursement for servant hire at the statutory rates." (Emphasis supplied).

August 25, 1945.—045-261.

CRIMINAL REPORTS—FEES

QUESTION: Is it mandatory by the sheriff to transmit criminal reports to the county solicitor on cases triable in his court, as provided by Section 923.01, Florida Statutes, 1941, and is he entitled to compensation for same?

To Honorable Thompson H. Getzen, County Solicitor, Dade City, Florida:

Section 923.01, Florida Statutes, 1941, provides:

" . . . the sheriff when an arrest is made, other than on a *capias*, shall transmit to the prosecuting attorney of the trial court having jurisdiction, a report"

In my opinion such a report should be made as being necessary for the proper enforcement of our criminal laws. Therefore, I think that the word "shall" should be construed as making it mandatory upon the sheriff to furnish such reports.

As to the fees for making such a report, I gave an opinion on March 5, 1942, in which I said that as no compensation was provided in the statutes for the services required in making the report, no compensation should be allowed.

Chapter 22587, General Statutes of 1945, made no change in the then existing law.

June 28, 1945.—045-160.

FEES FOR CONVEYING TWO PRISONERS

QUESTION: Where a sheriff conveys two prisoners from Key West to the Industrial School for Boys at Marianna, with one guard, what mileage may be charged?

To Honorable Berlin A. Sawyer, Sheriff, Monroe County, Key West, Florida:

Construing Section 30.23, Florida Statutes, 1941, as amended by Chapter 22587, Laws of 1945, it is my opinion that you are entitled to charge only 12½c per mile each way by the nearest and most direct route by public highway, regardless of the number of prisoners or guards who may be in the car.

March 13, 1945.—045-65.*

FEEDING PRISONERS—CHARGE

QUESTION: May a sheriff charge for feeding prisoners who were not actually fed on any basis of constructive sustenance?

To Honorable Maximo Valdez, Chairman, Board of County Commissioners, Monroe County, Key West, Florida:

Section 30.25, Florida Statutes, 1941, sets forth the compensation of the sheriffs for feeding prisoners, and is as follows:

For feeding twenty prisoners or less, each, per day, 75c.

All over twenty, each, per day, 60c.

I do not see where the sheriff is allowed any fees for feeding a prisoner whom he did not feed at all. In the case of *Smith et al v. State ex rel. Thomas, Sheriff*, 154 So. 184, the court there said:

"Of course a sheriff would not be entitled to fees for feeding a prisoner which he did not feed at all."

In view of this decision, the above question must be answered in the negative.

February 13, 1945.—045-38.

CONSTABLES—BONDS; FEES

QUESTIONS: 1. May a constable take and approve bonds?

2. If the foregoing question is answered in the affirmative, what is his fee for such service?

To Honorable Carlyle Ausley, County Clerk, Marion County, Ocala, Florida:

In your letter you quote the last sentence in paragraph (2), page 56, of the Attorney General's Biennial Report of 1941-1942. That is a correct statement of the law. The constable may not take and approve bonds under the circumstances set out in that quoted part of the opinion.

If you will read the whole opinion you will find, however, that there are certain circumstances in which the constable may take and approve bonds, and what is said in that respect is adhered to. This is in answer to your first question.

Section 30.23, Florida Statutes, 1941, allows the sheriff for writing, taking, and approving bonds a fee of \$2.00. Section 37.20, Florida Statutes, 1941, provides that "The fees of constables shall be the same as are at this time allowed sheriffs for like service." The Florida Statutes of 1941 were adopted in 1941 and readopted in 1943. Our supreme court had held that a revision of the statutes is one enactment and that, therefore, the fees allowed to the constable by the revised statutes would be the same as those allowed the sheriff in the same revision of the statutes. See *Williams vs. State*, 131 So. 864, and *State vs. Harlee*, 131 So. 866. Under the ruling in those cases, it is my opinion that in cases where a constable may lawfully take and approve bonds, he is entitled to a fee of \$2.00.

June 28, 1946.—046-279.

POWERS OF CONSTABLES—COMMITMENT

QUESTIONS: 1. Should a constable have commitment papers in order for a sheriff to accept and lock up his prisoner, except drunks?

2. Should a constable be in possession of keys to county jail?

To Honorable T. M. Anderson, Sheriff, DeSoto County, Arcadia, Florida:

Ordinarily, neither a sheriff nor a constable, nor a deputy sheriff, has the right to arrest a person even on a warrant and lock such person up in jail without taking him before a committing magistrate, except where the person arrested waived his right to be taken before such magistrate.

The Honorable Fred H. Davis, at one time attorney general of Florida and afterwards a member of the Supreme Court of Florida, on October 2, 1930, gave an opinion on this question as follows:

"The law requires that every person locked up in a jail be incarcerated there only under proper legal commitment of a judicial officer. While the justice of peace or a county judge has the right to issue a warrant for the arrest of a prisoner, the authority to arrest is merely a right to apprehend and take the prisoner into custody until such time as he can be taken before either the justice of peace or the county judge who issued the warrant or before some other justice of peace or county judge. Neither a sheriff, deputy sheriff nor constable has the right to arrest a prisoner, even on a warrant, and lock such prisoner up in jail without taking him before a committing magistrate for the purpose of making bail, or for the purpose of having the magistrate determine whether bail is allowable, except, of course, where the prisoner arrested informs the officer that he waives his right to be taken before a magistrate, in which case the original warrant may be sufficient authority for the officer to lock the prisoner up until he can get a proper commitment from the justice of peace or other authority issuing the warrant. Section 8339 of the Compiled General Laws plainly indicates that a commitment is required."

I concur in this opinion except I feel that there are exceptional circumstances where a person arrested can be placed in jail without taking him before a committing magistrate, such as: where he is drunk, where he is insane or where a magistrate is not accessible.

Answering your second question, I would say that the sheriff is responsible for the keeping of the jail and the keeping of the prisoners therein. A constable cannot demand that he be furnished keys to the county jail.

August 31, 1946.—046-370.

APPREHENDING INSANE PERSON—FEES

QUESTIONS: 1. Should a sheriff be allowed fees for apprehending a former patient of the hospital who was regularly committed and admitted to the institution, and after care and treatment had been furnished to a relative or guardian for discharge and consequently became in need of further hospitalization and it became necessary for the sheriff to take the patient into his custody and confine him?

2. Who should pay such sheriff's fees?

To the Board of Commissioners, State Institutions:

According to the usual certificate of furlough signed in such cases, the party to whom the patient is released binds and obligates himself to the Florida State Hospital to take charge of the patient and, if it becomes necessary to return him to the hospital for further care and treatment, such party agrees to pay all costs of same.

If in emergency cases it should become necessary for the sheriff to take into his custody and control such a patient, he is entitled to his fees for such services and same would be a charge against the person to whom the said patient was furloughed.

I think that it would be the duty of the Florida State Hospital to see that such a party pays the sheriff for his costs. If this party is insolvent so that he is not able to pay the said costs and charges, or refuses to pay within a reasonable time after demand therefor, I think it would be the duty of the Florida State Hospital to pay for same, for the said hospital through its superintendent approves the said certificate and the financial condition of the party undertaking the charge of the said patient.

This opinion is based upon the patient being taken into custody by the sheriff because of a recurrence of his mental condition which requires further care and treatment and not upon an entirely new and distinct mental condition in no way connected with his original mental condition.

April 4, 1946.—046-137.

COMMITMENT—FEES

QUESTION: In Hillsborough county may the sheriff or the constable charge the fees for "Commitment to jail of prisoner—\$1.50" and "Recommitment under order—.75" provided by Chapter 22827, Acts of 1945, which amends Section 30.23, Florida Statutes, 1941?

To Honorable Bryan Willis, State Auditor:

Constables and sheriffs are coexecutive officers of county judges and justices of the peace courts (Sections 36.11 and 37.16, Florida Statutes, 1941).

A commitment by a county judge or a justice of the peace may therefore be directed either to a sheriff or a constable.

If the commitment is directed to a constable and he executes same by taking the prisoner to jail, he is entitled to the fee. If the commitment is directed to the sheriff and the sheriff executes the same by taking the prisoner to jail, he is entitled to the fee.

The same rules which apply to the commitment would, in my opinion, apply to the fee for recommitment.

June 29, 1946.—046-281.

JOINT CITY—COUNTY JAIL—FEES

QUESTION: If the county of Santa Rosa and the city of Milton construct a building to be used by both as a jail, and under the law the sheriff is custodian of the jail, could he waive fees to which he would be entitled under the Florida laws for commitment and release of prisoners turned over to the jail by the city police department?

To Honorable A. L. Johnson, Attorney at Law, Milton, Florida:

This opinion in no wise passes upon the authority of the city of Milton and the county of Santa Rosa to jointly construct a building to be used by both as a jail.

In my opinion, if such a jail is constructed, as outlined by you, I know of no reason why the sheriff could not waive such fees.

I understand that this has been the practice for many years in some of the counties in the state where the same building is used jointly as a jail by a municipality and the county. I believe you will find that the city of Tallahassee and the county of Leon have such an arrangement and the sheriff waives his fees.

April 20, 1945.—045-97.

POSSESSION OF MOONSHINE—VENEREAL DISEASE—TRANSPORTING PRISONER TO HOSPITAL—FEES

QUESTIONS: 1. May a person be prosecuted for possession of non-taxpaid moonshine liquor and, if so, what is the proper procedure for destruction of such liquor after conviction of the possessor?

2. Where the sheriff's legal duty requires him to carry a prisoner to a hospital for treatment what are the proper sheriff's fees for handling the prisoner?

3. What is the proper procedure for apprehending and transferring to a quarantine hospital for treatment a person afflicted with an infectious venereal disease who refuses to take treatment regularly?

4. Where a person afflicted with an infectious venereal disease is committed to a quarantine hospital by a sheriff acting under authority of a commitment issued by a health officer, what fees are payable to such sheriff for executing said commitment?

To Honorable J. T. Shepherd, Sheriff, St. Johns County, St. Augustine, Florida:

My opinion as to these several questions is as follows:

1. Your inquiry does not identify the statute under which the conviction for possession of moonshine liquor was had.

Section 562.15, Florida Statutes, 1941, penalizes the possession of unstamped alcoholic beverages containing more than 1 per cent of alcohol by weight "as to the sale of which beverages an excise stamp tax is required to be paid." However, the cases of *Brown v. State*, 13 So. 2d. 458, *Sellers v. Bridges*, 15 So. 2d. 293, and *State v. Pridgen*, 19 So. 2d. 510, hold that the Beverage Act does not impose a tax on moonshine whiskey. It is therefore my opinion that no prosecution for possession of unstamped moonshine liquor may lawfully be maintained under said Section 562.15. Consequently, it would be superfluous to discuss procedure for destruction of moonshine liquor after conviction of its possessor under said statute.

Section 562.18, Florida Statutes, 1941, makes it an offense to possess a beverage containing more than 1 per cent of alcohol by weight, on which a Federal Excise Tax is required to be paid, unless such Federal Excise Tax has been paid as to such beverage. In my opinion the possessor of moonshine liquor on which the federal tax has not been paid may be prosecuted under said Section 562.18. Where a person is convicted under said statute for possession of moonshine liquor on which the federal tax has not been paid, and which has lawfully come into the possession of the sheriff or constable as evidence, such liquor cannot be redelivered to him, because it would be in further violation of said statute for the defendant to retake possession of it. I therefore suggest that the judge of the court in which the case is tried may enter an order for the destruction of such moonshine liquor by the sheriff or constable who seized it as evidence. I do not find in existence at this time any statute which would require such destruction to be in the presence of the clerk of the circuit court.

2. Whenever it becomes the sheriff's legal duty to transport a prisoner from the county jail to a hospital for treatment and back to the jail, the sheriff is entitled to 12½¢ per mile each way for himself or his deputy, and 12½¢ per mile each way for the prisoner.

3. Where a person afflicted with an infectious venereal disease fails to take treatments as required by law, and is taken into custody under warrant sworn out for such failure, or where a person so afflicted is in custody and is charged with or already convicted of some other misdemeanor, the health officer may commit such person, for quarantine and treatment, to a hospital operated by the State Board of Health for that purpose, and under Section 3 of Chapter 21948, Acts of 1943 (Section 384.16, Supplement to Florida Statutes, 1941), the health officer has the option of requiring such person to be transported to such hospital either by the sheriff, or by the chief of police, or by a duly authorized deputy sheriff or police officer, or by an officer of the Florida Highway Patrol.

It is my opinion that where the person afflicted with an infectious venereal disease is not in custody, the health officer may proceed under Section 1, Chapter 21948, Acts of 1943 (Section 384.14, Supplement to Florida Statutes, 1941), to issue a commitment for quarantine, which commitment should be directed to the sheriff. Upon receipt of this commitment, the sheriff should execute it by taking into custody the person named therein and by delivering such person to the quarantine hospital designated in the commitment. It is not necessary to have a warrant when the commitment is under this statute.

4. Section 5, Chapter 21948, Acts of 1943 (Section 384.18, Cumulative Supplement, Florida Statutes, 1941), provides that for services rendered under said chapter, sheriffs shall receive the same fees and mileage as are prescribed for like service in criminal cases. Therefore, for executing a commitment issued by the health officer under circumstances outlined in my answer to question 3 above, the sheriff is entitled to the mileage and fees that he would be entitled to if he performed like service in a criminal case.

June 22, 1946.—046-272.

DEPUTIES—FILING OF NAME—BOND

QUESTIONS: 1. Is it necessary that the name of the deputy sheriff be filed with the board of county commissioners?

2. Does the law require a bond of the deputy sheriff to be approved by the board of county commissioners when the bond is one where the surety is a solvent surety company authorized to do business in this state?

To Honorable J. L. Overstreet, Clerk of the Circuit Court, Osceola County, Kissimmee, Florida:

Section 30.08, Florida Statutes, 1941, as amended by Chapter 22790, Laws of 1945, says that the name and number of the voting precinct of each deputy sheriff appointed by the sheriff shall be filed with the board of county commissioners at their first regular meeting after such appointment and the same shall become a part of the minutes of the board of county commissioners.

I think this answers your first question.

Section 30.09, subsection 1, as amended by Chapter 22790, Laws of 1945, says that each deputy sheriff appointed as aforesaid (referring to said Section 30.08, Florida Statutes, 1941, as amended) shall be required to give bond with two or more good and sufficient sureties to be approved by the board of county commissioners and filed with the clerk of circuit court, and that no deputy sheriff shall be allowed to perform any service as such deputy until the bond has been approved.

Subsection 2 of said Section 30.09, Florida Statutes, 1941, says the requisite of two sureties and justification of the same shall not apply when surety is by a solvent surety company authorized to do business in this state.

"Justification" in this subsection does not mean "approval." In the ordinary sense when a bond is justified it means that the sureties thereon state under oath that they are worth the amount of said bond over and above the exemptions allowed them by law. This requisite is generally removed where the surety is a solvent surety company authorized to do business in this state for such a company is not supposed to be authorized to do business in this state unless its solvency has first been determined by the state.

It is my opinion, therefore, that the bond of a deputy sheriff, either where the sureties are persons, or where the surety is a solvent surety company authorized to do business in this state, must be approved by the board of county commissioners and then filed with the clerk of the circuit court.

In the case of *Stinson v. State*, 80 So. 506, it was there held that one appointed by a sheriff to be a deputy under said Section 30.09, Florida Statutes, 1941, and who takes the prescribed oath and executes surety bond and files it with the board of county commissioners, can perform no services as deputy until bond is approved by the board.

March 22, 1945.—045-76.

DEPUTIES; CONSTABLES—DUAL OFFICES

QUESTION: May constables also hold office as deputy sheriffs?

To Honorable Fred Holloman, Sheriff, Alachua County, Gainesville, Florida:

This will acknowledge receipt of your letter of the 20th of March, in which you state:

"It has been my impression that a duly authorized constable could not hold a deputy sheriff's commission.

"I will appreciate it very much if you will give me your opinion as to whether I am correct."

In reply I wish to advise that you are correct in your impression. Under date of August 15, 1927, an opinion was rendered by the then attorney general, the pertinent part of which is:

"Section 15 of Article XVI of the Constitution of the State of Florida reads as follows:

" 'Section 15. No person holding or exercising the functions of any office under any foreign government, under the Government of the United States, or under any other state, shall hold any office of honor or profit under the government of this state; and no person shall hold, or perform the functions of, more than one office under the government of this state at the same time; Provided, notaries public, militia officers, county school officers and commissioners of deeds may be elected or appointed to fill any legislative, executive or judicial office.' "

"A deputy sheriff 'performs the functions of' the duties of the office of sheriff under authority of law. See Sections 2881 to 2883 of the Revised General Statutes of Florida. As a deputy sheriff such officer has the right to do anything that the sheriff can do except appoint a deputy. See *Guarantee Trust Company vs. Buddington*, 23 Fla. 514.

"It, therefore, appears to be plain that it is against the spirit as well as the letter of Section 15 of Article XVI of the Constitution of this state for a duly elected and qualified constable to accept appointment as and perform the duties of deputy sheriff."

This opinion was concurred in by me in an opinion I rendered April 19, 1941, and I concur therein now.

April 24, 1946.—046-169.

RELEASE OF BONDSMAN—NUMBER NECESSARY

QUESTIONS: 1. The defendant has been tried, convicted and fined \$50.00 and costs, or 90 days in jail; he made a good and sufficient fine and cost bond and is released and out of the custody of the sheriff. Afterwards and before any default in the conditions of the bond the bondsmen desire to be released from the said bond, does a sheriff have any authority to release the said bondsmen on the said bond and re-arrest the defendant and return him to jail to serve his sentence?

2. Is one bondsman sufficient to make a good fine and cost bond where he is amply worth the bond, or does it take two bondsmen to make a legal bond?

To Honorable Frank Morris, Sheriff, Citrus County, Inverness, Florida:

I know of no authority whereby you can rearrest the defendant under such circumstances as set out in Question No. 1. Should the defendant voluntarily surrender himself to you before the expiration of the 90 days, the term for which the bond is given, and begin serving his alternate term of imprisonment in the county jail, then the bond can be cancelled and the sureties released therefrom. *Carver v. State*, 183 So. 719.

In an opinion which I rendered on August 6, 1945, I held that inasmuch as the defendant can voluntarily surrender himself and serve his sentence and cancel his bond, if the sureties surrender the defendant to the proper sheriff before the expiration of the 90 days, the sheriff should accept said defendant into his custody and the bond can be cancelled and sureties released therefrom; however, I know of no law giving you any authority to go out and rearrest the defendant.

Section 921.15, Florida Statutes, 1941, says: "Such bail shall be by bond conditioned for the payment of fine and costs, executed by the defendant and one or more good and respectable persons." This answers Question No. 2.

December 17, 1946.—046-519.

REWARD—THEFT OF LIVESTOCK—EXPENSE

QUESTIONS: 1. May the sheriff of a county legally offer a reward for the arrest and conviction in cases involving the theft of livestock, and charge this reward as an expense of the office. We have been referred to A.G.O. 1929, page 349, and A.G.O. 1921, page 240.

2. May the sheriff of a county pay other peace officers for making arrests and charge this as an expense of the office?

To Honorable J. T. Shepherd, Sheriff, St. Johns County, St. Augustine, Florida:

In 1921 the Honorable Rivers Buford, in the Attorney General's Opinion to which you refer at page 240, held that "a sheriff is not entitled to reimbursement from the county for money which he offers and pays as a reward for apprehension of a person charged with crime."

In 1930, the Honorable Fred H. Davis, then attorney general, held:

"A sheriff has the legal right to offer a reward payable from the earnings of his office for the capture of criminals or otherwise in connection with his official duties."

I cannot agree with the opinion of the Honorable Fred H. Davis. He gives no benefit to us of any authorities for his opinion. The general law is:

"The legislature has the power to offer rewards for the doing of acts which would be of public benefit and it may . . . delegate this power to municipal corporations . . . So, too, it may empower designated officers, as for example, the governor, the prosecuting attorney, United States Attorney General or United States Marshal, to offer rewards for such purposes . . . The authority of such officers to offer rewards must be governed by the construction of the statutory provision." 54 C.J., Par. 10, Rewards, page 779.

In this same work, page 780, note 97 (b and c) will be found many cases which hold that the county commissioners cannot be bound by an offer of reward by a board of county commissioners or supervisors and that sheriffs have no power to bind the county by the offer of a reward for the capture of an escaped criminal. The Florida legislature has never delegated to the sheriffs the power to offer rewards.

I realize that it has been the practice of the sheriffs to offer rewards and be it said to their credit, I know of no instance where they have abused this privilege; however, I know of no authority by which they can bind the county or pay from the earnings of their office rewards for the capture of criminals. In either event the practical result will be that the sheriff if he offers rewards and pays same, he will be paying such rewards from county funds, for which I find no authority for him so to do.

I, therefore, answer your first question in the negative.

As to your second question, Attorney General Davis in the above stated opinion said:

"The sheriff is entitled to a fee for arresting a prisoner and if he desires to pay a member of the Jacksonville police department a fee which would ordinarily go to him for making an arrest, I see no legal objection which would prohibit him from doing so."

I see no reason why you cannot pay a peace officer for making an arrest and charge this as an expense to your office. However, if you handle the matter this way you cannot render a bill in your behalf to your county for the same arrest fee, for only one fee is payable for the same arrest. Such fees paid out by you can either be billed to the county or charged to your expenses, but you cannot do both.

February 20, 1946.—046-72.

LIVESTOCK—RETURN ON SALE

QUESTION: Does the sheriff make a return of all sales of livestock (sold under the provisions of Chapter 23312) to the clerk of the circuit court, or report only the sales where there are proceeds left over after such sales have been made and expenses paid?

To Honorable Ben Coker, Clerk of the Circuit Court, Hardee County, Wauchula, Florida:

Section 9 of said Chapter 23312 says: "that the sheriff or constable upon making sale as aforesaid shall make a written return thereof to the clerk of the circuit court of Hardee county, Florida, with a description of the animals sold by him, which return and description shall be filed by the clerk."

In my opinion this means all sales made by the sheriff or constable whether there is any balance left over after making the sale or not. In this manner a record of all sales will be filed with the clerk and subject to inspection by the public.

August 17, 1945.—045-241.

FINE AND COST BOND—LIABILITY FOR COLLECTION

QUESTIONS: 1. To whom and to what extent is the sheriff who approves a fine and cost bond liable for its collection and remittance to the county fine and forfeiture fund?

2. Who is responsible for the enforcement of such liability?
3. What is the proper procedure if enforcement is found necessary?
4. What is the penalty for failure to proceed in such a case?

To Honorable Roy B. Hendry, Chairman, Board of County Commissioners, Dixie County, Cross City, Florida:

1. I assume that the fine and cost bond was given for stay of execution of sentence to fine as provided by Section 921.15, Florida Statutes, 1941; and the same has become forfeited because not paid at the expiration thereof.

When a bond so given is not paid according to its terms and conditions, it becomes the duty of the sheriff to return the bond to the court in which the conviction occurred, endorsed "not paid" and to take the person convicted into custody and to cause such person to begin the service of the sentence as imposed by the court without further orders or procedure. See *Laney, et al vs. State, ex rel. Farrior*, 130 So. 715.

After the bond has been so returned to the court by the sheriff, it shall be the duty of the clerk to forthwith issue execution for the amount of the fine and costs against the security or bail as if there had been a judgment at law on such bond, and the same proceeding shall be had as in cases of other executions. Section 921.15, Florida Statutes, 1941. It shall thereupon be the duty of the sheriff to collect said execution, if possible, and return it to the court within a reasonable time. *Johnson v. Price*, 36 So. 1031.

If it develops that the bond so taken by the sheriff is worthless and at the time it was approved by the sheriff he knew that the same was worthless, then, in my opinion, the bond of the sheriff would be liable, because his bond is conditioned upon the faithful discharge of the duties of his office (see Sections 30.01 and 30.02, Florida Statutes, 1941), and the taking of such a bond would be a breach of this condition.

If the sheriff has collected any fine and cost bond and has failed to pay same over as required by law, then, under Section 30.21, Florida Statutes, 1941, the sheriff and/or his sureties on his bond would be liable for the amount of the money so collected and not paid over.

2. Section 125.01, Florida Statutes, 1941, says that it is the duty of the county commissioners to represent the county in the prosecution and defense of all legal causes. Therefore, in my opinion, it is the duty of the county commissioners to enforce the liability set forth in the answer to Question 1 hereof.

3. I think the answers to Questions 1 and 2 answer this question.

4. Article IV, Section 15 of the Constitution of Florida says any officer who shall have been appointed or elected and not subject to impeachment may be suspended by the governor for neglect of duty.

I trust that this answers your questions.

July 18, 1945.—045-190.

ARREST OF PAROLE VIOLATOR—TELEGRAPHIC REQUEST

QUESTIONS: 1. When a warrant is issued by a member of the parole commission for the arrest of a parole violator, does a sheriff to whom such warrant has not been delivered have the authority to arrest such parolee upon telegraphic request?

2. If such sheriff refuses to make such arrest because the warrant has not been delivered to him, what steps may be taken by the parole commission in regard to such refusal?

To the Florida Parole Commission, Tallahassee, Florida:

1. Section 947.22, Florida Statutes, 1941, provides for the issuance and service of warrants for parole violators and empowers parole and probation supervisors to arrest such violators without warrants. Were this the only applicable statute a sheriff would have no authority to arrest a parole violator except by virtue of a warrant placed in his hands for execution. However, it is my opinion that Section 901.15 (4), Florida Statutes, 1941, is also applicable. This section authorizes a peace officer to arrest without warrant "when a warrant has been issued charging any criminal offense and has been placed in the hands of any peace officer for execution." It has been held that a person is still charged with a crime until he serves the sentence imposed on him upon conviction, within the meaning of the Federal Extradition Statute, and that a parolee whose parole has been revoked is a person charged with crime so as to be subject to extradition. *People ex rel. Westbrook vs. O'Neil*, 38 NE 2nd 174. By analogy, it appears that a parolee for whom a Florida parole commissioner has issued a warrant under Section 947.22 is charged with a criminal offense within the meaning of Section 901.15 (4), and that when such warrant is placed in the hands of any peace officer for execution, a sheriff to whom the warrant has not been delivered has authority to arrest such parolee without warrant upon the telegraphic request of such peace officer. Under Section 901.15 (4) it is necessary that the parole commissioner's warrant be actually delivered to some peace officer for execution in order that a sheriff to whom it has not been delivered may have authority to make the arrest.

I am of the further opinion that a parole or probation supervisor is a peace officer within the meaning of Section 901.15 (4) in so far as parole violators and warrants for their arrests are concerned, and that when a parole commissioner's warrant has been delivered to any parole or probation supervisor for execution, then, under said section, any sheriff may arrest the parole violator upon telegraphic request of such supervisor.

2. It is the mandatory duty of a sheriff to execute writs or other process, civil or criminal, placed in his hands for service in his county. See Sections 30.19 and 144.01, Florida Statutes, 1941. A different rule applies to arrests without warrants. Section 901.15 provides that a peace officer "may" make arrests without warrants in certain enumerated cases, but does not impose a mandatory duty on him to do so. Therefore, if a sheriff should refuse to arrest a parole violator upon telegraphic request advising him that a parole commissioner's warrant for such violator has been placed in the hands of a peace officer for execution, I do not know of any steps the parole commission could take to require such sheriff to make such arrest or to punish him for refusing to do so.

October 2, 1945.—045-307.

FEES—TRANSPORTATION OF DESTITUTE PATIENTS

QUESTION: If the sheriff of a county delivers a duly committed destitute patient to Florida State Hospital, may the actual expense incurred by the sheriff incident thereto be paid from money appropriated for maintenance of said hospital, under authority of Chapter 23133, Laws of Florida, Acts of 1945?

To Honorable John T. Wigginton, Secretary, Board of Commissioners of State Institutions:

Said Chapter 23133 amends Section 394.09, Florida Statutes, 1941. Such amended Section 394.09 provides, in effect, that if it shall appear to the committing judge that any lunatic or insane person is destitute, he shall commit such person to the sheriff for safekeeping; that the sheriff shall notify the superintendent of the Florida State Hospital, who shall send some suitable attendant or nurse for such patient; and that the sheriff shall deliver such patient to such attendant or nurse, and the latter shall carry such patient to said hospital. There is a proviso that the actual expense of such attendant or nurse, together with expenses of transporting such patient, shall be paid from "money appropriated for the maintenance of said hospital." There is another proviso that the necessary expenses of the sheriff in delivering the patient to the attendant or nurse shall be paid, together with his other costs, "as provided in Section 394.23."

It is here noted that the costs provided to be paid by Section 394.23 are costs payable by the county.

We are here concerned with the authority, under said Chapter 23133, to pay a sheriff for rendering the services contemplated by the above question out of money appropriated for the maintenance of said hospital.

In view of the wording and apparent intent of the foregoing law, in my opinion, the above question properly is answered as follows:

It appears that under normal circumstances the nurse or attendant to be sent by the superintendent of the Florida State Hospital for a patient held by a sheriff under the circumstances related above will be a nurse or attendant employed at said hospital. However, it would appear that the superintendent could designate a sheriff as a suitable attendant to transport a committed patient so held by him to the hospital, and in such event said sheriff properly would be entitled to actual expenses incurred by him in so delivering the patient to the hospital, payable from money appropriated for the maintenance of said hospital, as provided by said Chapter 23133. What will constitute actual expenses for the transporting of a patient to the hospital by a sheriff, under such circumstances, is not here considered and must depend upon a request for advice with respect thereto arising in an actual case presenting the question. If the sheriff is not so designated by the superintendent and transports the patient to the hospital, he is not entitled to have such actual expenses incurred by him incident thereto payable from funds of the hospital.

June 30, 1945.—045-166.

PRISONER IN FEDERAL CUSTODY—EXTRADITION

QUESTION: Under the Florida Statutes, is the sheriff authorized to take a prisoner into custody from the Federal Correctional Institution in Leon county, on an out-of-state warrant, at the request of an out-of-state sheriff, and allow the defendant to sign a waiver of extradition and not go before a committing magistrate in this state?

To Honorable Frank Stoutamire, Sheriff, Leon County:

I assume that the prisoner will be released to you by the federal authorities.

The fact that the prisoner may have been brought into Florida involuntarily to serve a term in the Federal Correctional Institution would be no defense to extradition proceedings.

See case of *Kelly v. Mangum*, Sheriff, 88 S. E. 556:

"Where a fugitive from justice from the State of Missouri was convicted of a crime in a United States district court in the State of Alabama, and was committed to the United States penitentiary in Georgia to serve his sentence, upon his release therefrom at the expiration of such term, upon requisition from the Governor of Missouri, the Governor of Georgia could issue his warrant, and could have such person arrested for rendition to the demanding state.

"Under such facts the person so arrested as a fugitive from justice was not entitled to a discharge from custody by writ of habeas corpus on the ground that he did not voluntarily come into the State of Georgia as a fugitive."

Having an out-of-state warrant in your hands, being requested by an out-of-state sheriff for the arrest of this prisoner would give you the right to arrest him without a warrant's being issued in this state, provided the crime is one punishable by death, or imprisonment for a term exceeding one year. Chapter 941.14, Florida Statutes, 1941.

Section 941.26, Florida Statutes, 1941, provides that the prisoner may waive certain rights and further states that nothing contained in said section shall be deemed to "limit the rights of the accused person to return voluntarily and without formality to the demanding state."

I am aware that said Section 941.14 says that if a person is arrested without a warrant "he must be taken before a judge or magistrate with all practicable speed and complaint be made before said magistrate," but, in my opinion, while a waiver of this right was not specifically mentioned in said Section 941.26, still I feel that this is a right which may be waived by the prisoner inasmuch as he can waive jurisdiction of his person in any criminal charge.

"Where a court has jurisdiction of the subject matter, jurisdiction of the person of accused may be conferred by consent or waiver." Criminal Law, 22 C. J. S., page 244, §147.

January 9, 1945.—045-8.

DUAL OFFICES—DEPUTY SHERIFF AND COUNTY COMMISSIONER

QUESTION: May a member of the board of county commissioners be lawfully appointed to serve as a deputy sheriff?

To Honorable L. B. Osteen, Sheriff, Indian River County, Vero Beach, Florida:

Section 15, Article XVI of the Florida Constitution provides, among other things, that no person shall hold or perform the functions of more than one office under the government of this state at the same time, excepting from the provisions thereof certain offices not relative to this discussion.

Section 27, Article III, Florida Constitution, provides that the legislature shall provide for the election by the people or appointment by the governor of all state and county officers, not otherwise provided for by

the Constitution. There is no provision in the Florida Constitution with respect to the appointment and qualification of deputy sheriffs, and their appointment and qualification, powers and duties depend entirely upon the statutes with respect thereto. Sections 30.07, 30.08 and 30.09, Florida Statutes, 1941. It would seem, therefore, that a deputy sheriff is not an officer within the meaning and intent of said Section 15, Article XVI, Florida Constitution. Also see *County of Nassau, Appellant, vs. Mark W. Downee, Appellee*, 16 Fla. 171, 174, holding a "bailiff" is not an officer within the meaning of our constitution.

At common law one person could not hold two offices which were considered incompatible. This rule was founded upon the plainest principles of public policy and its correctness and propriety are instantly recognized. Section 59, 42 Am. Jur. 926.

While, as noted above, it seems that a deputy sheriff is not a public "officer" in Florida, he has the power to perform every function of the office of sheriff, except one, and that is, the power to appoint a deputy. *Guarantee Trust and Safe Deposit Company vs. Buddington*, 23 Fla. 514. It is assumed that one who is appointed deputy sheriff will maintain a loyal relationship with the sheriff appointing him.

One of the major duties devolving upon a board of county commissioners is the approval and payment of cost bills of county officers, among which are the bills of the sheriff. It is recognized that under the common law rule the offices of sheriff and county commissioner are of their nature incompatible.

In my opinion, the above question is properly answered as follows:

There seems to be nothing in the constitution and statutes prohibiting a county commissioner from serving also as a duly appointed and qualified deputy sheriff. However, one person functioning in both capacities would be contrary to the reason for and spirit of the common law rule prohibiting the holding of incompatible offices by one person, and such is not to be approved.

August 1, 1945.—045-211.

DUAL OFFICE—SHERIFF AS PROBATION OFFICER

QUESTION: May the governor appoint the sheriff of Charlotte county, Florida, as a juvenile probation officer of that county at a salary of \$100.00 per year?

To Honorable Millard F. Caldwell, Governor:

In my opinion, this cannot be done, as it would violate Section 15 of Article XVI of the Constitution of Florida, which reads as follows:

"Section 15. No person holding or exercising the functions of any office under any foreign government, under the government of the United States, or under any other state, shall hold any office of honor or profit under the government of this state; and no person shall hold, or perform the functions of, more than one office under the government of this state at the same time; Provided, notaries public, militia officers, county school officers and commissioners of deeds may be elected or appointed to fill any legislative, executive or judicial office."

Inasmuch as the sheriff is an "officer" of the state, and a probation officer, as provided in Section 415.08, Florida Statutes Annotated, is also an "officer," (See decision of the Supreme Court in *State ex rel. Attorney General Gibbs, vs. Marten*, 193 So. 835), such an appointment would violate the said Section 15 of Article XVI of our constitution in that it would in effect attempt to vest in one person more than one office under the government of this state at the same time.

May 21, 1946.—046-221.

SERVICE OF WARRANT—VESSEL

QUESTION: What is the authority of the sheriff for serving criminal warrants on vessels for crimes committed on shore?

To Honorable Stanford Bragdon, Sheriff of Franklin County, Apalachicola, Florida:

I assume that the vessel, at the time when the service of the warrant is necessary, is located within the territorial limits of your county. Such limits have been defined by the Supreme Court of Florida (*Lipscomb v. Kaloroukas*, 133 So. 104) as including area within Gulf of Mexico adjacent to upland and out to state boundary line (three marine leagues from mainland).

"The State of Florida may exercise powers of sovereignty over the waters of the Gulf of Mexico within the boundary lines of the State of Florida."

Lipscomb v. Kaloroukas,
supra

In serving these warrants I think it will be necessary for you to make a distinction between public vessels, such as war ships, and private vessels, such as merchant vessels, and in the case of public ships, to make a distinction between those belonging to the government of the United States and those belonging to the government of a foreign nation.

In the case of a public vessel owned by the United States such as a warship, 6 *Corpus Juris Secundum*, Army and Navy, Section 38, says:

"Persons in the military or naval service may be guilty of criminal acts for which they may be prosecuted in civil or military courts."

Therefore, under these conditions when a crime has been committed on shore and the offender for whom you have a warrant has returned to his said vessel within the three marine leagues limit, I would make a request to the commander of such vessel to be permitted to serve the said offender, and I believe you will find in every instance that the commander will allow you to serve this, but if he should not do so, I would advise you to take the matter up at once with the Secretary of the Navy.

In the case of a public vessel like a warship owned by a foreign nation, it is considered by legal fiction a detached and floating portion of the state to which it belongs. Although it therefore has immunity from control by the local sovereignty, it cannot harbor criminals. While for obvious reasons there can be no invasion of the warship by the sovereign power of the shore to make an arrest, if objected to, yet it is the duty of the commander of the vessel to surrender to the sovereign power of the shore all persons charged with ordinary crimes. If he refuses to do so resort must of course be had through the proper channels by diplomatic appeal to his government (*United States v. Diaz*, 1 *Puerto Rico Fed.* 186). If, therefore, you should have a warrant against an offender who is connected with such a public foreign vessel and he has returned on board such vessel, within the three marine leagues limit, I would suggest that you make a request to the commander of that vessel for the said offender, and, if he refuses, take the matter up through the proper diplomatic channels.

If the vessel is a private vessel such as a merchant vessel, whether domestic or foreign, within the three marine leagues limit, the sovereignty of the shore (in this case the state) may by due process arrest thereon a person charged with crime against the state (*United States v. Diaz*, *supra*, also 16 *C.J.* 169-170, paragraphs 216-219). Under this condition you would have authority to serve the warrant as you would any other criminal warrant. (In *re Newman*, 79 *Fed.* 622).

August 13, 1945.—045-250.

MINOR—ELIBILITY AS CLERK OF THE COURT

QUESTION: May a person over eighteen years of age and under twenty-one years of age be appointed and legally serve as clerk of the county judge's court?

To Honorable Sam D. May, County Judge, Washington County, Chipley, Florida:

Section 36.04, Florida Statutes, 1941, as amended by Chapter 22559, Acts of Florida, 1945, states that the county judge shall have power to appoint a clerk of his court; that the said clerk shall be paid by the said judge and may exercise all nonjudicial functions which the judge may perform.

There is nothing in the law saying that a minor, that is, a person under the age of twenty-one years, cannot serve as such clerk. *Harkreader vs. State*, 33 Southwestern Reporter, page 117, a Texas case, holds that a minor is eligible to hold the office of deputy county clerk, and in arriving at that decision, quotes the following law which I think is applicable to this case:

"Looking into the decisions of the courts of other states as to this and kindred subjects, we find the rule stated to be this: If the office is ministerial, such as calls for the exercise of skill and diligence only, minors may legally hold the same, and execute the duties thereof; but if the office is a judicial one, or one which concerns the administration of justice, on account of their inexperience and want of judgment and learning they cannot be appointed to same."

United States vs. Bixby, 9 Fed. 78, says:

"While at common law persons are not admitted to the full enjoyment of political and civil rights until they have attained the age of twenty-one years, yet . . . In both England and this country they are capable of holding and discharging the duties of such mere ministerial offices as call for the exercise of skill and diligence only."

In my opinion, a minor can therefore be appointed as clerk of the county judge's court as he has only ministerial duties to perform.

March 27, 1945.—045-79.

COUNTY JUDGE—FEES IN PROBATE MATTERS

QUESTION: What fees are allowed the county judge in probate matters under Chapter 21960, Acts of 1943?

To Honorable Sam D. May, County Judge, Washington County, Chipley, Florida:

Answering your letter of March 26, 1945, concerning fees to be allowed county judges, it is my opinion that Chapter 21960, Acts of 1943, relates only to fees allowed the county judge in **probate matters**. By examination of the said act it will be seen that it was preceded by the following preamble:

"WHEREAS sub-paragraph (3) of Section 36.17 of 'Florida Statutes 1941' purports to specify fees authorized to be charged for particular services by county judges in probate matters according to the law then in force and effect; and

"WHEREAS said sub-paragraph (3) fails to specify certain essential items of service in probate matters and the proper fees legally chargeable therefor; and

"WHEREAS there has been no intervening change by the Legislature in the schedule of fees for such services; and

"WHEREAS said 36.17 should be revised and corrected so as to include the items omitted therefrom in said 1941 revision; NOW THEREFORE, . . ."

Furthermore, such an act seems to be almost a re-enactment of Chapter 5200, C.G.L., 1927, which says:

"The fees of the county judge as judge of probate shall be as follows:"

As to the sample cost bill which you have submitted to me, being entitled "Criminal Cost Bill in County Judge's Court," county, Florida," it is my opinion that the following criticism can be directed toward the following items appearing thereon:

"Affidavit: Writing 25-15 (55)

Warrant: Writing 25-12½ (50)

Commitment or Order: Writing 25-12½ (50)

Writing cost bill: 25-12½ (50)

Copy order discharging or holding defendant: Writing 25-12½ (50)."

If the writing in the said affidavit, warrant, commitment, cost bill or order discharging or holding the defendant is not over one hundred words, the county judge would be entitled to a fee of twenty-five (25c) cents for writing each of the said papers, and for each additional one hundred words or fraction thereof, an additional fee of twelve and a half (12½c) cents, but, according to those who have had experience with these matters, such writings would each not ordinarily exceed two hundred words, and thus in most cases the fee for each writing would be twenty-five (25c) cents or perhaps thirty-eight (38c) cents.

I find no authority for the fee of fifteen (15c) cents appearing in the writing of the affidavit.

I find no authority for approving in a criminal cost bill the following items:

"Entering judgment and sentence.....	75
Certificate of conviction.....	30."

In "Filing papers 10 (30)" being in the eighth item of said sample, in a great many cases no bond is filed and the total cost would, in these cases, be 20c.

The other items appearing in the said sample appear to be in order.

April 20, 1946.—046-160.

CLERK—FUNCTIONS AND POWERS

QUESTION: Can persons who desire to vote an absentee ballot in the county judge's office vote the same before the duly authorized appointed deputy clerk in the absence of the county judge?

To Honorable John T. Rose, Jr., County Judge, Charlotte County, Punta Gorda, Florida:

Section 36.04, Florida Statutes, 1941, gives every county judge the power to appoint a clerk of his court who may exercise "all nonjudicial functions" which the judge may perform.

Section 101.07, Florida Statutes, 1941, requires the county judge to furnish to certain electors desiring to cast absentee ballots an official ballot "upon satisfactory proof to such county judge . . . that an applicant therefor is qualified to vote in such election . . ."

In my opinion, if you have exercised your power under said Section 36.04 to appoint, and have appointed, a clerk of your court, and the appointment is not temporary and such clerk has entered into the performance of the duties incident to such appointment, then persons who may desire to vote an absentee ballot in your office may do so in your absence before such duly authorized clerk.

It is my further opinion that such clerk, in determining the facts prerequisite to an elector's right to vote such a ballot, is not exercising a judicial function. It is noted that while you refer to your "duly authorized deputy clerk," said Section 36.04 provides for the appointment of a "clerk," and I am assuming you are referring to a "clerk" as distinguished from a "deputy clerk."

March 29, 1946.—046-119.

COUNTY JUDGE—ORIGINAL CRIMINAL JURISDICTION

QUESTION: Does the county judge have original jurisdiction to try and determine crimes as set forth in Section 317.21, Florida Statutes, 1941?

To Mr. William A. Bonifay, County Judge, Santa Rosa County, Milton, Florida:

I assume that you have no county court or criminal court of record in your county, or any local law applicable to such crimes.

Section 317.21 was originally enacted as Chapter 20578, Acts of 1941. In the original law the punishment for the crime mentioned therein upon first conviction was "by imprisonment for a period of not more than 90 days or by fine of not less than \$25.00 nor more than \$1,000.00, or by both such fine and imprisonment."

Chapter 22000, paragraph 7, Laws of 1943, corrected said Chapter 20578 to read as follows:

" . . . by imprisonment for a period of not more than 90 days or by fine of not less than twenty-five dollars nor more than five hundred dollars."

Section 36.01, Florida Statutes, 1941, says:

"The county judge shall have original jurisdiction, in counties where there are no county courts or criminal courts of record, to try and determine all misdemeanors committed in his county punishable by fine not exceeding five hundred dollars or by imprisonment not exceeding six months, or by both such fine and imprisonment."

In my opinion, therefore, you have jurisdiction to try first offenders charged with such crimes as set forth in Section 317.21, Florida Statutes, 1941.

May 31, 1945.—045-130.

CONSTABLES—FEES

QUESTIONS: 1. Where there is no justice of the peace in a district and the constable takes prisoners before the county judge for preliminary hearing, if the prisoner pleads guilty, is the constable entitled to a \$5.00 fee for attendance on court?

2. When the constable has been summoned to appear as a witness for the state in a criminal case to be tried in the county court, is he entitled to mileage and per diem?

3. When the constable makes arrests, brings the prisoner to jail, subsequently swears out a warrant for his arrest and gives the names of the witnesses to the county judge, is he entitled as of right to serve the warrants and subpoenas arising in such a case?

To Mr. Mark Bateman, Constable, Fort Myers, Florida:

1. A plea of guilty before a committing magistrate is in effect only a waiver of a preliminary hearing. In my opinion you are entitled to a fee of \$5.00 for attendance thereon.

Bear in mind you are not entitled to an attendance fee in each case where more than one case was thus heard in one day.

2. You are not entitled to any mileage or per diem. See Section 43, paragraph (d) of the Criminal Code, which is Section 902.19, paragraph (4), Florida Statutes, 1941. *Trawick v. State*, 1 So. 2d 641.

3. You could serve such papers, but you are not entitled as of right to serve same. Section 36.11, Florida Statutes, 1941, states:

"The sheriff of the county or any constable shall be the executive officer of the county judge's court, etc."

"The process is not the command of the officer serving the writ, but it is the command of the court issuing the writ."
Fountain vs. Fountain, 167 So. 651.

June 12, 1945.—045-145.

CONSTABLES—FEES

QUESTION: There is no justice of the peace in District No. 3, Lee county, Florida. There is a constable who carries prisoners before the county judge for commitment. The sheriff attends the court, and acts as executive officer. Is the constable entitled to attendance fee of \$5.00 a day under these circumstances because he arrests the prisoners and takes them before the county judge who is acting as the committing magistrate?

To Mr. Mark Batemen, Constable, Fort Myers, Florida:

My predecessor on February 10, 1934, gave an opinion reading as follows:

"A constable is not entitled to four dollars for attendance on court on each case; he is entitled to a per diem for attendance on court when he acts as executive officer of the court and his attendance is necessary."

In this I concur.

The sheriff of the county or any constable shall be the executive officer of the county judge's court. Section 36.11, Florida Statutes, 1941.

While the law does not state in so many words who shall determine whether the sheriff or the constable shall be the executive officer of the said court, I think it only a matter of practical reason that it is the county judge's prerogative to designate which officer shall so serve.

If the sheriff, on the day that the constable took the prisoner to the court of the county judge for commitment, was, under the direction of the county judge, acting as the executive officer and was in attendance on court, then I think that the constable is not entitled to a fee for attendance on court as I do not see that his attendance is necessary.

I do not think that the legislature intended to pay two officers for the same services, at the same time and in the same court.

January 18, 1946.—046-18.

PROSECUTOR A CANDIDATE FOR STATE ATTORNEY

QUESTION: May the duly elected and active prosecuting attorney for the county judge's court of Leon county, Florida, legally be a candidate for the office of state attorney for the second judicial circuit and still hold his office as prosecuting attorney while acting as such candidate?

To Honorable William D. Hopkins, Prosecuting Attorney of the County Judge's Court, Leon County, Tallahassee, Florida:

I have carefully examined the constitution and statutes of Florida pertinent to the subject of your inquiry and I find no specific nor inferential prohibition against a prosecuting attorney's acting as a candidate for the office of state attorney while still occupying the office of prosecuting attorney. Therefore, provided the prosecuting attorney is qualified in other respects, it is my opinion that your question should be answered in the affirmative.

November 1, 1946.—046-446.

COUNTY JUDGES—CAPIAS—FEE

QUESTIONS: 1. Is the county liable for the costs of the county judge in cases where affidavits are made before the said judge charging criminal offenses, warrants are issued, the amount of the bond endorsed thereon and the warrants are delivered to the sheriff, but no further proceedings are had in the cases, and after a lapse of time said cases are dismissed by the county judge?

2. Is the county liable for the costs of the county judge in criminal cases which the judge has jurisdiction to try, for issuing capias when the defendants' bonds are estreated—the county judge in some instances turns the said capias over to the sheriff for service and in other instances merely places them in the files of the court?

To Honorable Bryan Willis, State Auditor:

If such cases are ones which the county judge has jurisdiction to try and all proceedings therein are bona fide, it is my opinion that the county judge would be entitled to his fees when the cases are dismissed by him.

If the judge issues capias in a bona fide effort to get possession of the defendants so that said defendants can be tried for their crimes and the capias are turned over to the sheriff for service, whether the capias are served or not, I think the judge is entitled to his fee for issuing same. If, on the other hand, the capias are merely prepared, signed and sealed by the judge and placed in the files, I cannot conceive that this would be such an issuance as would entitle the county judge to his fee.

I am not unmindful of Section 36.17, Florida Statutes, 1941, which says that the fees allowed county judges are the same as allowed clerks of circuit court for similar services and that Section 28.24, Florida Statutes, 1941, which sets forth the compensation of the clerks of the circuit court, says:

"The word 'issuing' when used in this section shall be construed to mean the writing, signing and sealing of such instruments."

A capias is without any force or effect until placed in the hands of the executive officer of the court for service. I think the language used in the statute pre-supposes that the judge will issue a paper which shall be of some force and effect rather than issue a paper which would be valueless and the making of which would constitute only an idle gesture.

CRIMINAL COURT OF RECORD

December 11, 1945.—045-383.

JUDGES—EXPENSES WHEN ASSIGNED TO ANOTHER COUNTY

QUESTION: Where the judge of a criminal court of record for one county is assigned to hold a criminal court of record in another county, should his subsistence and traveling expenses be paid by the state or one of the counties?

To Honorable J. M. Lee, State Comptroller:

For many years the statutes of this state have provided for the substitution and assignment of judges of the criminal courts of record when the presiding judge is unable to act (Section 32.06, Florida Statutes, 1941, as amended by Chapter 23134, Laws of Florida, Acts of 1945; see also Sections 38.01-38.11, Florida Statutes, 1941). No provision is made in any of the above statutes for the payment of subsistence and traveling expenses of judges assigned to hold criminal courts of record in other counties. Section 112.06, Florida Statutes, 1941, and Chapter 22830, Laws of Florida, Acts of 1945, are confined to expenses incurred by state officers and employees when traveling on state business and do not extend to county officers and employees.

Judges of the criminal courts of record appear to be county officials. The Supreme Court held that county solicitors are county officials and not state officials. (*Felaez v. State*, 107 Fla. 30, 144 So. 364, text 365; *State v. Barnes*, 24 Fla. 29, 3 So. 433, text 434). If the prosecuting officer of the criminal court of record is a county official, it would seem to follow that the judge of that court is likewise a county official. In this connection see also *State v. Burns*, 38 Fla. 367, 21 So. 290, text 295; Advisory opinion to the Governor, 13 Fla. 687, text 689, 691 and 695; *Gadsden County v. Green*, 22 Fla. 101, text 110; 10 Words and Phrases 92 et seq. where county officers are defined.

I am, therefore, of the opinion that where the judge of a criminal court of record for one county is assigned to hold a criminal court of record in another county, that his subsistence and traveling expenses should be paid by the county to which assigned; unless the legislature has included in the current General Appropriation Act an appropriation for the payment of such expenses. There is evidence that the legislature may have included an appropriation for this purpose.

For the biennium beginning July 1, 1933, and prior biennium, the budget report to the legislature included an item for "expenses judges criminal court sitting in other counties . . . \$250.00." The same item was included in appropriation acts for 1931 and prior years (Chapters 15719, 14483, 11808, 11332, 9121, 8405, 7783, 7277, etc., Laws of Florida, Acts of 1931, 1929, 1927, 1925, 1923, 1921, 1919, 1917, etc.). Beginning with Chapter 15858 Laws of Florida, Acts of 1933, the legislature has provided a lump sum for the judicial department for "expenses" or "necessary and regular expenses" (Chapters 22827, 22071, 20980, 19280, 17707 and 16772, Laws of Florida, Acts of 1945, 1943, 1941, 1939, 1937 and 1935). Although the budget to the 1933 legislature included an item of \$250.00 per year for the expenses of criminal court judges sitting in other counties, it has since said year lumped all expenses together in its budget report without itemizing the same. I am informed that such expenses have been paid from time to time since 1933; this would seem to amount to a departmental construction that such an item has been included in the appropriation bills.

The above matters and things indicate that the legislature included a similar item in the current appropriation bill; however, this fact should be ascertained from the budget commission and if such an item was included, then I believe the comptroller would be authorized to pay the expense from the general appropriation to the judicial department.

May 3, 1946.—046-188.

ORDER OF ASSIGNMENT—NUNC PRO TUNC

QUESTION: Where it was necessary for the judge of the criminal court of record of A county to be absent on the opening day of the April, 1946, term of that court and he made arrangements with the judge of the criminal court of record of B county to preside in his stead on that date and addressed to the governor a telegraphic suggestion that an order of assignment be issued to that effect, but the governor was absent from the state and had no knowledge of the suggestion until after the judge from B county had presided in the criminal court of record of county A on the opening day of the term thereof, may the governor now issue such an order of assignment nunc pro tunc?

To Honorable Millard F. Caldwell, Governor:

The office of a nunc pro tunc order is not to create, but to speak what has been done or was intended to be done. *Cranston v. Stanfield*, 261 P. (Ore.) 52. Generally speaking, an order nunc pro tunc is one by which is done now that which was intended to be done at the time the matter was originally acted upon but which was at that time inadvertently omitted. *Taylor v. Chapman*, 173 So. (Fla.) 143.

The order under consideration does not fall within these definitions, but would be in the nature of an original order of retroactive effect. Therefore, it is my opinion that the question should be answered in the negative.

May 30, 1945.—045-128.

PROBATION AND PAROLE OFFICER—APPOINTMENT

QUESTION: The first appointment of a probation and parole officer for the criminal court of record of Duval county after Chapter 21074, Acts of 1941, became a law was made June 15, 1943, until next session of the senate; and the present incumbent (who was also the appointee on June 15, 1943), appointed by the governor and confirmed by the senate, was commissioned for the unexpired term on April 18, 1945, which term expires June 15, 1947. What effect, if any, does Chapter 22661, Acts of 1945 (which became a law May 22, 1945), creating the office of probation and parole officer for the criminal court of record in all counties having a population in excess of 200,000 according to the last federal census, have with respect to such office and officers?

To Honorable R. A. Gray, Secretary of State:

The inquiry results from the request of the probation and parole officer of the criminal court of record of Duval county to the Secretary of State that a new commission under said Chapter 22661 be issued to him. That request and the inquiry above presents the question of whether or not Chapter 22661 abolished the office of such officer. Reference is made to several acts of the legislature relating to this office. Population figures for Duval county, pertinent here, according to the several mentioned censuses, are as follows: Federal of 1930, 155,503; Federal of 1940, 210,143; State of 1935, 175,204.

Chapter 19248, Acts of 1939, created the office of probation and parole officer of the criminal court of record in the counties of the state in the population bracket of 85,000-165,000 according to the last federal census, and this act became a law June 3, 1939, Chapter 19245, Acts of 1939, created the office of probation and parole officer for the criminal court of record and the court of crimes, or either or both in counties having a population of not less than 165,000 according to the last state census. This act became a law June 1, 1939. Since Duval county was included in both these acts, it would seem that Chapter 19248 controlled as to such county, at least until the county grew out of the population bracket.

It is further noted that with respect to powers and duties of such parole and probation officer, Chapters 19248, 21074 and 22661 are substantially the same; the only difference being that in the two former acts the appointee was required to be confirmed by the senate, which requirement was not contained in the latter act.

On June 16, 1939, a probation and parole officer for the criminal court of record of Duval county was appointed, and he handed in his resignation, which was effective April 15, 1941. The present incumbent of the office was appointed April 17, 1941, to serve until June 16, 1943. It is apparent from the records of the office of the secretary of state that the first appointment made after Chapter 21074 became a law was on June 15, 1943, which fixed the four-year cycle ending June 15, 1947. *State vs. Bird*, 163 So. 248.

An office created by the legislature may be abolished by it; and in this power is included the power to effect change of the incumbent. 42 Am. Jur., page 904, Section 33; *Jacksonville vs. Smoot*, 92 So. 617 (relating to a municipal office); *State ex rel. Watson vs. Crooks, et al.*, 15 So. 2d, 675 (relating to the governing body of a port district).

In this country, the holder of an office has no vested right to or contract right in such office. *Butler vs. Penn.*, 13 L. Ed. 472. That the legislature may substitute a new office for an old one, under certain circumstances, is recognized. *State ex rel. Yancey vs. Hyde*, 129 Ind. N. E. 186; *State ex rel. Watson vs. Crooks, et al.*, supra. There may be doubt that the legislature may by a single act abolish and create the identical office. *State ex rel. Birdsey vs. Baldwin*, 45 Conn. 134.

A study of the several acts here involved, particularly Chapters 21074 and 22661, leads me to the conclusion that Chapter 22661 did not abolish the office of probation and parole officer for the criminal court of record of Duval county then and theretofore existing; that the wording of Section 1 of the latter act that "there is hereby created the office of probation and parole officer, etc." was merely a restatement of the same provision in Chapter 21074, and that it was not the legislative intent that by such wording the office then existing was in one stroke abolished and recreated. I do not consider that the absence in Chapter 22661 of the former requirement that the senate confirm the governor's appointee is of such character as to change the nature of the office, and thus, on that ground, be the basis for the position that a new office was created.

In view of the foregoing, it is my opinion that the above inquiry is properly answered as follows:

Chapter 22661 did not abolish the office of probation and parole officer for the criminal court of record of Duval county, Florida, existing prior to and at the time such act became effective.

February 16, 1945.—045-49.

CLERK—DUTIES AS TO DOCKETS

QUESTIONS: Is it the duty of the clerk of a criminal court of record to keep:

1. A subpoena docket?
2. A conviction docket?

To Honorable Charles E. Limpus, Clerk of the County Court and Criminal Court of Record, Orange County, Orlando, Florida:

Section 32.11, Florida Statutes, 1941, provides that the clerk of the criminal court of record "shall have the same powers, duties and obligations that are exercised by and imposed on the clerks of the circuit courts."

A literal construction of this provision would give clerks of criminal courts of record the power, and impose upon them the duty to do everything that clerks of the circuit courts do, even to recording deeds and mortgages, handling tax redemptions and acting as clerks of the boards of county commissioners. Such is not the intent of the statute. The function of clerks of criminal courts of record is to perform the clerical duties incident to criminal causes in criminal courts of record, and Section 32.11 must be construed to give such clerks only such powers, and impose upon them only such duties, of clerks of circuit courts as properly pertain to the handling of criminal causes in criminal courts of record.

Answering Question 1: Section 28.21 (7), Florida Statutes, 1941, requires the clerk of the circuit court to keep a subpoena docket in which he shall enter "the name of each witness in each cause subpoenaed, with the date of the issuance of the subpoena." The making of such entries as to subpoenas issued in the criminal court of record is a proper function of the clerk of said court and, in my opinion, he should keep a subpoena docket in which to make the same.

Answering Question 2: Sections 28.26 and 28.27, Florida Statutes, 1941, provide that the clerk of the circuit court shall record the names of all persons convicted of crimes in any of the courts of his county, together with a statement of the crimes for which conviction was had. The book in which this recording is done is commonly referred to as a "Conviction Docket." The purpose of keeping this docket is to compile in one place a record of the convictions in the county, including those obtained in the criminal court of record, for the information of public officials and of the public generally. The clerk of the circuit court is designated to do this recording, and clerks of other courts having criminal jurisdiction, including the criminal court of record, are under the duty of transmitting to him the required information as to convictions in their courts. The keeping of a conviction docket is purely a matter of recording and is not an incident to any step in a criminal prosecution. If the clerk of the criminal court of record should undertake to keep such a docket, he could record in it only information relating to convictions in the criminal court of record, as the statutes do not require that he be furnished any data as to convictions in other courts, and this would not serve the purpose of the above mentioned statutes. In my opinion, the keeping of a conviction docket is peculiarly a function of the clerk of the circuit court and the clerk of the criminal court of record is neither required nor authorized to keep such a docket.

COUNTY COURTS

February 14, 1945.—045-43.

CONSTABLES—FEES FOR COURT ATTENDANCE

QUESTION: Where there is a vacancy in the office of justice of the peace and because of such vacancy, the constable of such district brings all of his cases in the county court, is the constable entitled to a per diem fee for attendance on the county court?

To Honorable Hiram W. Bryant, County Judge, Fort Myers, Florida:

Constables are allowed the same fee as sheriffs for like service. The allowance of a per diem fee to a sheriff for attendance on court is for his service as executive officer of the court. The sheriff, not the constable, is the executive officer of the county court. See Section 34.07, Florida Statutes, 1941. The constable having no duties as executive officer of the county court is not entitled to a per diem fee for attendance on that court.

May 18, 1945.—045-112.

CONSTABLES—FEES

QUESTION: Is a constable entitled to a fee of five dollars (\$5.00) per day, as set forth in Section 30.23, Florida Statutes, 1941 (as amended by Chapter 22587, Laws of Florida, Acts of 1945), for attendance on the county court?

To Mr. Mark Bateman, Constable, Fort Myers, Florida:

You state in your letter that you are constable in District No. 3, Lee county, that there is no justice of the peace and that all of your cases are taken before the county court. You wish to know if you are entitled to a fee of five dollars per day for attendance on said court.

In 1934 my predecessor filed an opinion in which he stated:

"A constable is entitled to a per diem for attendance on court when he acts as executive officer of the court and his attendance is necessary."

In this opinion I concur.

Section 34.07, Florida Statutes Annotated, 1941, prescribing who is the executive officer of a county court, reads as follows:

"The sheriff of the county shall serve and execute all civil and criminal processes of said court, and do and perform all duties in and about said court which are required to be performed by an executive officer."

Inasmuch, therefore, as the sheriff is the executive officer of the county court and is compelled by law to attend every term of the said court, (see Section 30.16, Florida Statutes, Annotated, 1941), I do not see where your attendance is necessary on a term of the county court, and neither do I see any law whereby you could be an executive officer of the county court.

Therefore, it is my opinion that you are not entitled to a fee of five dollars (\$5.00) per day for attendance on the county court for trial of cases.

Section 36.11, Florida Statutes Annotated, 1941, reads as follows:

"The sheriff of a county, or any constable, shall be the executive officer of the county judge's court. . . ."

I gather from your letter that you use the county judge as a committing magistrate as you have no justice of the peace. When, therefore, you carry a prisoner before the county judge and a preliminary hearing is thereupon held, or the prisoner waives preliminary hearing and the judge fixes bail, then, in my opinion, you are entitled to the statutory fee of five dollars (\$5.00) for attendance on court.

You are not entitled to the attendance fee in each case where more than one case is thus heard in one day.

JUSTICES OF THE PEACE

January 24, 1945.—045-11.

COUNTIES—DIVISION INTO JUSTICE OF THE PEACE DISTRICTS

QUESTION: Does amended Section 21, Article V, Florida Constitution, (adopted at the general election, 1944) cast any duty upon the board of county commissioners with respect to justice of the peace districts in their respective counties?

To Honorable John E. Morris, Attorney, Board of County Commissioners, Broward County, Fort Lauderdale, Florida:

Section 21, Article V, as amended at the last general election is a substitute for and replaces original Section 21, Article V. This section of the Constitution, prior to such amendment, casts a duty upon county commissioners with respect to division of their respective counties into justice of the peace districts. (See also Sections 37.04-37.07, Florida Statutes, 1941.) Section 21, as amended, seems to have taken from county commissioners this duty and power. Hence, it appears that the above question is answered in the negative.

November 2, 1946.—046-454.

JURISDICTION—DISTRICT BOUNDARIES—CHANGE

QUESTIONS: You were elected justice of the peace for District No. 1 of Hillsborough county in November, 1944. District No. 1 was then coextensive with County Commissioners Districts Nos. 1, 2, 3 and 5. Justice of the Peace District No. 2 was coextensive with County Commissioners District No. 4.

A few days ago the county commissioners redistricted the county commissioners districts and in so doing enlarged County Commissioners District No. 4 so that it now includes a number of precincts which were formerly in the Justice of the Peace District No. 1. The county commissioners have since the said redistricting defined Justice of the Peace District No. 1 as consisting of County Commissioners Districts Nos. 1, 2, 3 and 5, as so redistricted.

You desire to know (1) if you have the authority to try all crimes committed within District No. 1 of your county, as it existed prior to the redistricting, and (2) have the county commissioners the authority to reduce the boundaries of Justice of the Peace District No. 1?

To Honorable Joseph G. Spicola, Justice of the Peace, District No. 1, Hillsborough County, Tampa, Florida:

Section 21 of Article V of the Constitution as adopted in general election of 1944 reads as follows:

"There shall not be more than five justice districts in each county, and there shall be elected one justice of the peace for each justice district, who shall hold office for four years. Existing justice districts are hereby recognized, but the legislature may, by special act, from time to time change the boundaries of any such district now or hereafter established, and may establish new or abolish any such district now or hereafter existing. Provided, however, that any such changes shall be submitted to the people of any county so effected, by referendum at the next ensuing general election."

The county commissioners had no authority to change the boundaries of any justice district. The mere fact that they defined your justice district, to-wit: District No. 1, as consisting of County Commissioners Districts Nos. 1, 2, 3 and 5, as redistricted, would not alter the fact that they did in effect attempt to change the boundaries of your district, which is District No. 1, and did also thus attempt to change the boundaries of Justice of the Peace District No. 2. Under the above section of the Florida Constitution they have no authority to do this.

In view of this fact, it is my opinion that your first question should be answered in the affirmative and your second question should be answered in the negative.

April 10, 1945.—045-93.

FEE—BINDING OVER—COUNTY JUDGE'S COURT

QUESTION: Is a justice of the peace entitled to his costs and fees in cases coming under Section 37.03, Florida Statutes, 1941, where he binds the defendants over to the county judge's court?

To Honorable Thomas Green, Justice of the Peace, Cross City, Florida:

You state that one of the defendants before you plead not guilty, but that there were six witnesses who supported the charge, and that the other defendant plead guilty, but that the county judge released both without having any trial or hearing any evidence.

Sections 142.09 and 939.14 provide that the costs of the committing trial shall not be paid by the county, except the cost for executing the warrant, when the committing magistrate holds to bail or commits any person to answer a criminal charge in a county court, criminal court of record, or a circuit court, and an information is not filed nor an indictment found against such person. Under those sections it has been held that where no information or indictment is found, the justice of the peace is not entitled to his fees for the preliminary hearing. But in *State vs. Leon County*, 182 So. 639, the Supreme Court held that the provisions of those two statutes do not apply where a justice of the peace binds the defendant over to the county judge's court, for the reason that the county judge's court does not prosecute on information or indictment, and held that in such cases the justice of the peace is entitled to his fees and costs and that same should be paid by the county.

In view of the above cited case, it is my opinion that your question must be answered in the affirmative. I might add, however, that the county commissioners could lawfully refuse to pay such costs if the case were a frivolous one or if the binding over to the county judge's court were clearly lacking in good faith.

February 11, 1946.—046-69.

TRIAL JURISDICTION—GAMBLING—BOND ESTREATURE

QUESTIONS: 1. Do you as justice of the peace have the authority to allow a person charged with driving an automobile without the proper tag, to pay the costs of such proceeding and to buy a tag?

2. If a person is arrested for gambling, etc., do you have authority to accept a bond for his appearance before you, and upon failure to so appear, have you authority to estreat the bond?

To Honorable W. L. Long, Justice of the Peace, Highlands County, Sebring, Florida:

Your county has a population of less than fifty thousand according to the last preceding state census.

Your county does not have a criminal court of record.

I assume that your county has no local law which would affect this situation.

I have heretofore ruled that justices of the peace in counties of this state having a population of less than fifty thousand, according to the last preceding state census, have no criminal trial jurisdiction, but only the authority as committing magistrates.

In my opinion, therefore, you have no authority to discharge the person mentioned above from prosecution because in so doing you would be exercising trial jurisdiction. You would have the right and authority to bind him over.

If the person so arrested for gambling, from whom you have exacted a bond to appear before you at a certain time for **preliminary examination**, fails to appear, in my opinion, you would have authority to estreat this bond. Where the word "trial" is used in lieu of "preliminary examination" and such trial meant or referred to preliminary examination, similar estreating authority would exist in you.

If you have erroneously exacted a bond from such person conditioned to appear in your court for trial, inasmuch as you have no criminal trial jurisdiction, you would have no authority to estreat the bond because you would have had no authority to require same.

October 3, 1945.—045-308.

FEEES FOR APPROVING BONDS

QUESTION: Does Chapter 22587, Laws of Florida, Acts of 1945, authorize justices of the peace to charge a fee of \$2.00 for approving bonds?

To Honorable L. B. Morgan, Justice of the Peace, Escambia County, Pensacola, Florida:

The question should be answered in the negative. Chapter 22587, constituting an amendment of Sections 30.23 and 30.25, Florida Statutes, 1941, prescribes a schedule of fees to be charged by sheriffs and constables and has no bearing on the fees of justices of the peace.

It is provided by Section 81.26, Florida Statutes, 1941, that "the fees of a justice of the peace shall be the same as those of the clerk of the circuit court for similar services." Since Section 28.24, fixing the fees of clerks of the circuit court, prescribes a fee of one dollar for approving a bond, it is my opinion that this is the amount of the fee allowed a justice of the peace for performing a similar service.

August 31, 1945.—045-275.

OFFICES, SUPPLIES, ETC.—DUTY OF COUNTY TO FURNISH

QUESTION: Is it the duty of the county to furnish the justice of the peace an office, typewriter, office supplies and telephone for his use?

To Honorable G. H. Small, Justice of the Peace, Hendry County, Clewiston, Florida:

I assume that your question is based upon Section 43.03, Florida Statutes Annotated, 1941 (Chapter 21681, Laws of Florida, 1943), as this is the only law approaching this question which I can find. In that section it says:

"The judges of all constitutional courts of record and the judge of the court of record of Escambia county, Florida, shall be entitled to authorize and expend a sum not to exceed three hundred dollars per year for office furniture, furnishing, supplies equipment and expenses of the office of such judges."

The designation of the courts in such act as "all constitutional courts of record" is a very unfortunate one, and creates confusion in the minds of all.

In my opinion, though, a justice of the peace would never be classified as a "constitutional court of record" and your question must be answered in the negative.

July 3, 1945.—045-170.

AUTHORITY TO MAKE ARRESTS

QUESTION: What authority does a justice of the peace have to make arrests by virtue of his office?

To Honorable G. P. Lamb, Justice of the Peace, DeSoto County, Arcadia, Florida:

A justice of the peace is a judicial officer, not an arresting officer. His powers and duties are prescribed by the constitution and statutes.

Section 870.04, Florida Statutes, 1941, gives a justice of the peace the authority to disperse riotous assemblies and to arrest the participants in case they fail to disperse immediately and peaceably upon his command.

I find no other constitutional or statutory authority for a justice of the peace to make an arrest at any time or place except as provided by Section 870.04, and am therefore of the opinion that he cannot make arrests in other instances by virtue of his office.

July 3, 1945.—045-167.

JURISDICTION OF DEFENDANT IN CRIMINAL CASE

QUESTION: Where, after the issuance of a warrant by a justice of the peace but before service thereof, the defendant posts an appearance bond which as accepted and approved by the justice of the peace, is it necessary for the executive officer of the court to execute the warrant in order to give the justice of peace jurisdiction of the defendant?

To Honorable Joseph G. Spicola, Justice of the Peace, Tampa, Florida:

In every case the court must have jurisdiction of the subject matter, and jurisdiction of the person of the accused. The law confers jurisdiction of the subject matter. Jurisdiction of the person may be conferred by consent or waiver without the necessity of either the issuance or service of a warrant. The only function of a warrant is to enable the court to acquire jurisdiction of the person of the accused, and this may be effectively accomplished by the voluntary action of the defendant in posting bond, either before the issuance of the warrant or after the issuance of the warrant, but before its service. Section 14 American Jurisprudence 917, "Criminal Law," par. 214; 22 C.J.S. 244, "Criminal Law," par. 147; 22 C.J.S. 468, "Criminal Law," par. 316.

Therefore, if you accept and approve the bond before the service of the warrant, this dispenses with the necessity for service of the warrant and confers jurisdiction of the defendant's person upon your court. In any such case it would of course be incumbent upon you to bring your action to the attention of the officer holding the warrant and have him return it to the court.

July 17, 1945.—045-189.

JURISDICTION IN CRIMINAL CASES

QUESTIONS: What jurisdiction do justices of the peace have in criminal cases in counties of less than 50,000 population, in regard to:

1. Accepting pleas of guilty and imposing fines and/or costs?
2. Trying defendants before juries?
3. Issuing commitments for defendants convicted in their courts?
4. The disposition of misdemeanor cases?

To Honorable J. M. McKinney, County Attorney, Cross City, Florida:

1, 2 and 3. Section 37.01, Florida Statutes, 1941, prescribes the trial jurisdiction of justices of the peace. This section does not confer on justices of the peace in counties of less than 50,000 population any authority to try and determine criminal cases. Therefore, justices of the peace in such counties have no authority in criminal cases to accept pleas of guilty, try defendants before juries, adjudge defendants to be guilty of crimes, impose sentences or issue commitments to carry sentences into effect, because each of these acts constitutes a part of the process of trying and determining a criminal case.

4. Justices of the peace in counties of less than 50,000 population have the powers of committing magistrates in misdemeanor cases. See Article V, Section 22, Florida Constitution. Sections 37.03 and 901.01, Florida Statutes, 1941. *State v. Leon County*, 182 So. 639. As in the case of felonies, the powers of justices of the peace in such counties are exhausted when they dispose of misdemeanor cases by discharging the defendants or by binding them over to the proper court for trial after preliminary hearing or after waiver of preliminary hearing.

This opinion has no application to any justice of the peace who resides in a county having a criminal court of record and who may come within the provisions of Chapter 22118, Acts of 1943.

No opinion is expressed as to the constitutionality of any local law conferring trial jurisdiction in criminal cases on justices of the peace in counties of less than 50,000 population.

August 29, 1945.—045-273.

PRISONER TAKEN BEFORE ANOTHER MAGISTRATE—COSTS

QUESTION: Is the nearest justice of the peace entitled to costs in a case where an arresting officer takes the prisoner a greater distance to another magistrate?

To Honorable W. P. Meares, Justice of the Peace, Callahan, Florida:

Section 901.23, Florida Statutes, 1941, says:

"An officer who has arrested a person without a warrant shall, without unnecessary delay, take the person arrested before the nearest or most accessible magistrate in the county in which the arrest occurs having jurisdiction . . ."

I assume that the arrests are occurring in your justice of the peace district.

The purpose of this section is for the protection of the person arrested in that he must be taken before the nearest or most accessible magistrate without unreasonable delay, and if there is unreasonable delay the officer so arresting is responsible.

It is not always the nearest justice of the peace who is the most accessible and accordingly some discretion must be vested in the sheriff to determine to which magistrate he will take the prisoner. You, of course, are not entitled to any cost in any case not handled by you.

November 15, 1946.—046-500.

CONSTABLE—OFFICE—ABOLISHMENT

QUESTIONS: 1. At the general election held November 5, 1946, I was duly elected constable in and for District No. 1, DeSoto county, Florida. Assuming that Chapter 23249, Special Laws of Florida, 1945, is constitutional, does the ratifying of that act abolish the constitutional office of

constable to which I was elected at the election in which Chapter 23249, Special Laws of Florida of 1945, was adopted and ratified abolishing justice districts?

2. Under the constitution and laws of the State of Florida I am commissioned as a constable in and for District No. 1, DeSoto County, from the 9th day of October, A. D. 1945, until the first Tuesday after the first Monday in the month of January, A. D. 1947. Chapter 23249, Special Laws of Florida of 1945, was ratified and adopted in DeSoto county, Florida, at the general election held November 5, 1946, abolishing justice districts in DeSoto County. Does the adoption and ratification of this act under Article 5, Section 21 of the constitution abolish immediately my office as constable or do I continue in office until the expiration of my commission?

To Honorable C. D. Crews, Constable, District No. 1, DeSoto County, Arcadia, Florida:

I do not pass upon the constitutionality of said Chapter 23249, Special Laws of Florida, 1945. Whether the people, by the enactment of the said constitutional amendment, which is now designated Article V, Section 21 of our constitution, intended to give to the legislature the right to abolish by one "fell swoop" "all" justice of the peace districts in one county, and by this the abolishing of the office of constable, I do not pass any opinion thereon. This will have to be determined by the courts.

In my opinion, if the said Chapter 23249, Special Laws of Florida, 1945, is constitutional, then the justice of the peace districts of DeSoto county and your office as constable, were abolished when the election was had ratifying said Chapter 23249, Special Laws of Florida, 1945.

43 American Jurisprudence, paragraph 191, says:

"... The principle is that where the legislature is given by the Constitution the power to legislate on any specific subject matter, a statute passed in the exercise of this power, which conforms strictly to the constitutional grant, is not rendered unconstitutional by the fact that it has the incidental effect of legislating out of office certain officers holding office under the general provisions of the Constitution."

and cites for its authority the case of Conner v. Gray, a Mississippi case reported in 41 So. 186. In this case there was the creation of new counties which in effect shorten the term of some county officers. We believe the reasoning in this case sustains our opinion. We quote from the Conner case as follows:

"We might here rest our decision without saying more; but since the question is one of public importance, and it is charged in the bill that the officers named will be deprived of some constitutional rights which they have to hold office, and this feature of the case is argued to the court, we feel that we should go further and pass upon this right also. The Constitution of the State stands as a whole, and all its provisions are to be construed together as one entirety. That section of the Constitution which provides for the creation of new counties is a particular power granted to the legislature, more far-reaching and greater in its effect upon the body politic than those provisions of the Constitution which provide for the districting of the county into beats and districts and providing for the terms of officers, and its exercise by the legislature contains a necessary implication against anything contrary to it. The legislature cannot legislate out of office any constitutional officer, where the purpose of the act is to accomplish this alone; but where the power is given to the legislature by the Constitution to legislate upon any specific subject-matter, and in strict conformity to the power they do legislate, and it has the incidental effect of abolishing certain office hold-

ers holding office under the general provisions of the Constitution, those officers will be presumed to have been elected and to have accepted their offices in subservience to the power which existed in the legislature, by the exercise of its constitutional power, to dispense with the office holders as the incidental effect of the passage of the act creating the new county. The general provisions of the Constitution must yield when they come in conflict with other provisions of the Constitution of a more specific, greater, and more general effect. It cannot be contended that the constitutional convention ever intended to give to the legislature the power to create new counties, and then to have that right abridged by the fact that when they undertake to do so, some officer's term will be shortened."

March 17, 1945.—045-71.

CONSTABLES' FEES—COMMITMENT AND RELEASE

QUESTION: When is a constable entitled to commitment fees and release fees?

To Mr. C. V. Shealy, Constable, Perry, Florida:

Section 37.29 Florida Statutes, 1941, provides that the fees of constables shall be the same as were allowed sheriffs for like services when said section became a law in 1931, at which time Section 4568, C.G.L., prescribed that sheriffs should receive the following fees for commitment and release:

"Commitment to jail of prisoner arrested by him	1.00
Release of prisoner	.50"

In the light of Section 839.21, Florida Statutes, 1941, I do not think that the jailer's act in receiving a prisoner into the jail constitutes a commitment; rather, the commitment is the officer's act in carrying the prisoner to the jail and placing him in the jailer's custody. When a constable commits to jail a prisoner arrested by him, the service performed by him is like that performed by the sheriff in committing a prisoner to jail, arrested by the sheriff. Therefore, the constable is entitled to the commitment fee when he commits to jail a prisoner arrested by him, the commitment fee being payable only to the officer who commits to jail a "prisoner arrested by him."

In my opinion, a release fee is payable when a prisoner is released from the custody of the law, not when possession of the prisoner is transferred from one officer to another. Therefore, if the constable has the prisoner in his actual custody at the time the prisoner is released, I am of the opinion that the constable is entitled to the release fee, as his service in releasing a prisoner is like that performed by the sheriff in releasing a prisoner in the actual custody of the sheriff.

April 15, 1946.—046-124.

CONSTABLE—DEPUTY

QUESTION: Is Polk county entitled to a deputy constable for any of its justice of the peace districts?

To Honorable John W. Whitten, Constable, District No. 2, Polk County, Ft. Meade, Florida:

I am compelled to answer your question in the negative for I can find no law entitling a district in a county with a population of 112,000 according to the last state census to have a deputy constable.

August 1, 1945.—045-209.

CONSTABLE—AUTHORITY TO APPOINT A DEPUTY

QUESTION: Has a constable in a district in Bay county authority to appoint a deputy constable?

To Honorable Millard F. Caldwell, Governor:

On May 14, 1941, I rendered an opinion on this matter in which I stated:

"I find no authority of law that would permit you to have a deputy constable. Sections 4598 and 4597 (2) seem to be the only authority for the appointment of a deputy constable and in each instance it provides for a deputy constable in a district where the population is largely in excess of that in your district."

At common law a constable had no authority to appoint a permanent deputy for the general discharge of the duties of his office. *Pritchett vs. Clark*, 11 Pac. 49.

In my opinion, therefore, the constable in the district mentioned above has no authority to appoint a deputy constable.

April 16, 1945.—045-96.

AFFIDAVIT BEFORE JUSTICES—PROCEDURE

QUESTION: In Santa Rosa county a justice of the peace does not have trial jurisdiction. He serves only as a committing magistrate. Upon an affidavit made before, and warrant issued by, the justice of the peace, should the accused be tried on this affidavit or upon a new affidavit filed before the county judge?

To Honorable William A. Bonifay, County Judge, Santa Rosa County, Milton, Florida:

I think this question has been answered by our Supreme Court in the case of *State ex rel. Powell vs. Leon County*, reported in 182 So. 639, wherein our Court said:

"... when a justice of the peace issues process for the arrest of one charged with a misdemeanor he may exercise the powers of a committing magistrate and determine whether or not there is reasonable cause to believe the accused guilty as charged and if so to bind him over to the county judge's court for trial. Should he find reasonable cause to believe the accused guilty and bind him over to the county judge's court for trial. Should he find reasonable cause to believe the accused guilty and bind him over to the county judge for trial, then it becomes his duty to transmit to the county judge's court the affidavit, warrant and other papers filed in connection with the preliminary hearing and the accused should then be tried in the county judge's court on the affidavit filed before the justice of the peace, unless an amended affidavit for cause be filed in the county judge's court . . ."

JUDGES

February 7, 1945.—045-27.

DISQUALIFICATION—ASSIGNMENT OF NONRESIDENT JUDGE

QUESTION: I have affidavits from the only two resident judges of a judicial circuit disqualifying themselves from hearing a criminal prosecution now pending in their court and have been requested to assign a nonresident judge to hear the case.

I have just been advised that the attorneys for the accused defendant are filing a proceeding in the Supreme Court of Florida to compel one of the two judges who has heretofore disqualified himself by his own motion to sit in trial of the case in question.

Under such circumstances, has the governor the authority under the law to assign a nonresident judge to hear the case under consideration before the proceedings in the Supreme Court touching the disqualification of a resident judge have been concluded?

To Honorable Millard F. Caldwell, Governor:

Your inquiry does not include the reasons assigned by the judges for disqualifying themselves, but in view of my conclusions it is perhaps unnecessary.

Under Section 38.05, Florida Statutes, 1941, the following statement is made:

"38.05. *Disqualification of judge on own motion.* Any judge may of his own motion disqualify himself where, to his own knowledge, any of the grounds for a suggestion of disqualification, as named in Section 38.02, exist. The failure of a judge to so disqualify himself under this section shall not be assignable as error or subject to review by the supreme court."

In the case of *City of Palatka v. Frederick*, 128 Fla. 366, 174 So. 826, the Supreme Court of Florida approved the observation of the trial judge whose disqualification was sought to the effect that:

"A trial judge can no more disqualify himself when the proceedings do not justify it than he can refuse to disqualify himself if the proceedings do require it."

In the cited case it was found that the assigned causes of the alleged disqualification were insufficient.

In the case of *State ex rel. Colcord v. Young*, 31 Fla. 594, 12 So. 673, our Supreme Court decided that mandamus was the proper remedy to be employed when a trial judge disqualifies himself in a case in which he is not disqualified.

In view of the foregoing stated law it would seem, and it is my opinion, that the governor should await the decision of the Supreme Court upon the proceedings brought to test the disqualification of the judge before assigning another judge.

ATTORNEYS AT LAW

October 31, 1945.—045-364.

STATE BOARD OF LAW EXAMINERS—REQUISITION FOR EXPENSES

QUESTION: Under the provisions of Section 39.14, Florida Statutes, 1941, and Chapters 22830 and 22833, Acts of 1945, in what manner should requisition be made for expenses of the State Board of Law Examiners and the members thereof?

To Honorable H. Plant Osborne, Chairman, State Board of Law Examiners, Jacksonville, Florida:

Section 39.14, Florida Statutes, 1941, provides, in part, that all fees received by the board "shall be limited to the actual traveling expenses of members of the board in attending official meetings . . . and incidental expenses of administration . . ." and that "all bills shall be audited and approved by the board or by a committee of the board appointed for the purpose."

Chapter 22833, Acts of 1945, requires that all revenue received by every official, office, employee, bureau, division, board, commission, institution, agency or undertaking of the State of Florida shall be deposited in the state treasury, and provides that "in those instances where the expenditure of funds of regulatory boards or commissions has been provided for by laws other than the biennial appropriation bill, warrants shall issue upon requisition to the state comptroller by the governing body of such board or commission."

Chapter 22830, Acts of 1945, which is a temporary measure expiring on June 30, 1947, fixes the per diem allowance for subsistence of state officers and employees when traveling on state business, fixes a mileage allowance for their use of privately owned cars and requires that such officers and employees shall use transportation requests when traveling on state business by common carrier. The act also provides that "the comptroller shall promulgate such rules and regulations and prescribe such forms as shall be necessary to effectuate the purposes of this act."

The purpose of Chapter 22830 is to prescribe a uniform allowance for the expenses of state officers and employees while traveling on official business and to insure uniformity in the method by which such expenses shall be paid by the state. In discharge of the duties imposed upon him by the act, the state comptroller has required that the individual state officers and employees make requisition upon expense account forms prescribed by him for the reimbursement to which they are entitled under the law.

Section 2 of the act provides that "all laws and parts of laws in conflict with this act are hereby repealed." Therefore, I think that during its effective period this act supersedes the conflicting provisions of antecedent statutes, including portions of Section 39-14 referred to above, and that the act and the rules and regulations promulgated by the comptroller pursuant to its provisions are applicable to the members of the State Board of Law Examiners, who are state officers.

Both Chapters 22830 and 22833 became laws on June 11, 1945. The latter, the so-called "Five Funds Law," provides that in those instances where the expenditure of funds of regulatory boards or commissions has been provided for by laws other than the biennial appropriation bill, warrants shall issue upon requisition to the state comptroller by the governing body of such board or commission. The State Board of Law Examiners is a regulatory board, the expenditure of the funds of which has been provided for by laws other than the biennial appropriation bill. It also provides that all laws in conflict with it are repealed.

Since Chapters 22830 and 22833 became laws upon the same date, neither may be construed as repealing any of the provisions of the other and all seeming conflicts between the two must be reconciled. This may be accomplished by interpreting each in relation to the other and by recognizing the distinction between the traveling expenses of members of a regulatory board and other expenses chargeable to the funds appropriated for the board's use. As to regulatory boards such as the State Board of Law Examiners, it is apparent that the Legislature intended that Chapter 22830 should be applicable to the traveling expenses of the members and that Chapter 22833 should be applicable to all other expenses chargeable to the funds appropriated for the board's use.

Therefore, it is my opinion that the individual members of the State Board of Law Examiners must, after approval of such expenses by the board, make requisition to the comptroller for their allowances for subsistence and mileage while traveling on state business, in accordance with the provisions of Chapter 22830 and the rules and regulations promulgated by the comptroller; and that requisition should be made to the comptroller by the governing body of the board for the payment of all other expenses chargeable to the funds appropriated for the board's use.

October 2, 1945.—045-306.

JURORS AND JURY LISTS

JURORS—COMPENSATION IN COUNTY JUDGES' COURTS

QUESTION: What is the amount of per diem compensation prescribed by statute for jurors in courts of county judges?

To Honorable L. G. Gunter, County Judge, Dixie County, Cross City, Florida:

Section 40.24, Florida Statutes, 1941, specifies the compensation of grand and petit jurors in the circuit courts, criminal courts of record and county courts, and also provides that:

"Jurors in the courts of county judges and justices of the peace, and jurors summoned upon inquest of the dead, shall be paid one dollar per day for each day they serve on the jury . . ."
Section 41.08, Florida Statutes, 1941, provides that:

"Each juror in the county judge's court of the several counties of this state, having no county court, criminal court or court of record, shall receive in all cases three dollars for each day's attendance . . ."

When each is given its proper effect and construed in relation to the other, there is no conflict between the two sections. With respect to the per diem compensation of jurors in the courts of county judges, Section 41.08, prescribing compensation of three dollars per day, is applicable to counties "having no county court, criminal court or court of record"; and Section 40.24, fixing the compensation at one dollar per day, is applicable to counties that do have a county court, criminal court or court of record.

April 23, 1945.—045-99.

JURORS—FOOD AND LODGING

QUESTION: Should the county or the state pay a bill for meals furnished jurors in attendance on the trial of a criminal case?

To Honorable Jess Mathas, Clerk of the Circuit Court, DeLand, Florida:

Section 40.26, Florida Statutes, 1941, is as follows:

"The sheriff, when required by order of the court, shall provide juries with meals and lodging, the expense to be taxed against and paid by the state."

If the court enters an order directing the sheriff to provide meals for the jurors in any particular case, the cost thereof is to be paid by the state—otherwise, not.

December 16, 1946.—046-513.

MILEAGE—PER DIEM

QUESTION: It is the practice in this county to pay jurors and witnesses per diem as allowed by statute and to pay mileage one time in proceeding to the county seat and returning therefrom. This seems an unfair practice for normally the greatest percentage of these jurors come from places approximately 28 miles from the county seat, and if such a juror serves for a week and is not on a case which requires him to be confined, he proceeds to and from his home to the county seat on an average of five or six times during the week of his services. Is he entitled to all of the mileage he might make incident to his services?

*To Honorable Jess Mathas, Clerk of Circuit Court, Volusia County, De-
Land, Florida:*

In my opinion, the practice which you have been following is the only legal one under our existing law. I am fully aware of the hardship which this occasions but it is for the legislature to remedy this, and it only.

JURORS AND JURY LISTS FOR CERTAIN COUNTY JUDGES' COURTS

October 11, 1945.—045-320.

JURORS—METHOD OF SUMMONSING

QUESTIONS: 1. Is there statutory authority for the sheriff to summon a jury by any method other than that method provided for by Section 40.23, Florida Statutes, 1941?

2. Is it mandatory that the sheriff summon the jurors by registered mail?

3. Does any authority exist for the sheriff to summon jurors for services in the county judge's court of Franklin county by personal service?

*To Honorable R. M. Witherspoon, County Judge, Franklin County,
Apalachicola, Florida:*

I assume there is no special law affecting Franklin county bearing on these questions.

If your questions refer to jurors to be summoned at a term of court, I would call your attention to Section 40.22, Florida Statutes, 1941, said section reading as follows:

"The clerk of the circuit court, criminal court of record, county court, court of record in and for Escambia county, Florida, or the county judge, as the case may be, shall, at least ten days before the first day of court, issue and deliver to the sheriff a venire for the petit jury, under the seal of the court, commanding him to summon the persons named in the venire."

and Section 40.23, Florida Statutes, 1941, as amended by Chapter 22766, Laws of Florida, Acts of 1945, reading as follows:

"40.23. SUMMONING PETIT JURORS.—The sheriff shall summon the persons named in such venire to attend such court as petit jurors at least seven days previous to the sitting of such court, by registering to each person so named in the venire a written notice, addressed to his place of residence, and placing such notice in the United States mail with sufficient postage to carry the same and with return receipt requested, unless otherwise directed by the court. If otherwise directed by the court, then the sheriff shall summon such jurors in the manner directed, making the same returnable as directed by the court."

It is my opinion that if the sheriff receives such a venire ten days before the first day of the term and the county judge does not direct him otherwise, it is his duty to summon the jurors by registered mail.

If you have reference to criminal cases to be tried out of term, I would refer you to Section 937.06, Florida Statutes, 1941, which reads as follows:

"Issues of fact shall be tried by jury. If the cause be tried in term, it shall be tried as other jury causes are tried, but if it be tried out of term, the justice shall direct the sheriff or constable to summon and return forthwith six qualified persons to act as

jurors. The officer shall summon them personally, and shall return a list of the persons summoned. If the number for any cause be deficient, the justice shall supply the deficiency by directing the officer to summon bystanders, or others who may be competent to act as jurors."

and Section 937.01, Florida Statutes, 1941, which provides that the duties of the justice of the peace shall apply to and regulate the proceedings of the county judge in criminal cases.

In case no jury is drawn in the county judge's court for any term thereof, or for any reason those drawn and summoned cannot be obtained for the trial, then under Sections 41.05 and 41.06, Florida Statutes, 1941, the procedure is set out for the summoning of jurors and in such cases it must necessarily be done by personal service.

PROVISIONS RELATING TO COURTS GENERALLY

January 14, 1946.—046-14.

ASSISTANT COUNTY SOLICITORS—SALARY

QUESTION: What is the salary of an assistant county solicitor for the criminal court of record for Polk county, Florida?

To Honorable Gunter Stephenson, County Solicitor, Polk County, Florida:

The General Law of 1937, Chapter 17858, provided for the office of assistant county solicitor in those counties having a population of not less than seventy thousand inhabitants nor more than one hundred thousand, according to the last preceding state or federal census, whichever may be the later, and fixed the compensation of such assistant. Polk county was within this population bracket in 1937.

Chapter 19677, General Laws of 1939, merely increased the salary of such assistant.

The population of Polk county according to the 1945 state census is more than one hundred thousand and, therefore, Polk county outgrew the population bracket of the aforesaid Chapters 17858 and 19677.

Chapter 10292, General Laws of 1925, provides for an assistant county solicitor in counties having a population of eighty thousand or more according to the 1920 federal census or any subsequent census, and provides for compensation. Polk county is within these population brackets and it is my opinion that Chapter 10292, General Laws of 1925, will govern the salary of said assistant county solicitor for said county; provided, however, that the said Chapter 10292, General Laws of 1925, has not been repealed by Section 43.02, 1943 Supplement to Florida Statutes, 1941, which reads as follows:

"(1) In all counties having a constitutional court of record in the State of Florida, and in and for the Court of Record of Escambia County, Florida, each county solicitor for said counties and for said courts may appoint one assistant . . . which said assistant shall be known as the assistant county solicitor . . ."

"(3) The compensation of said assistant appointed under the provisions of this law shall be twenty-four hundred dollars per annum. . . ."

Whether said Section 43.02 repeals Chapter 10292, General Laws of 1925, is a question as to which I do not express an opinion. There is a diversity of opinion as to whether the words "constitutional court of record," as used in Section 43.02, refer (1) only to a "Court of Record," eo nomine, such as is created for Escambia county by Article V, Section 39 of the Florida Constitution, or (2) to any court of record, regardless of its name, having a county solicitor and whose creation is authorized by the Constitution. I think that this question should be passed upon by the courts.

CHAPTER VI

CIVIL PRACTICE AND PROCEDURE

COMMENCEMENT OF SUITS AT LAW AND PROCESS

October 25, 1945.—045-336.

SPECIAL OFFICER—AUTHORITY OF COURT TO APPOINT

QUESTION: Has the court, in connection with an investigation, the authority to appoint a special officer to serve all papers and do all things which would normally be done by the sheriff?

To Honorable Millard F. Caldwell, Governor:

It appears that the purpose of a certain grand jury investigation is two-fold, viz., (1) to inquire into the circumstances surrounding the slaying of "A" and to ascertain the identity of the slayer or slayers and his or their criminal liability; and (2) to inquire into the circumstances of how and by what means the slayer or slayers took "A" from the county jail, and to ascertain whether the sheriff was negligent in the matter and whether criminal liability is chargeable to him.

Therefore, it appears that the sheriff is directly and personally interested in the investigation.

In 47 American Jurisprudence 844, "Sheriffs, Police and Constables," Paragraph 31, it is said:

"It is an established principle that a sheriff should not act when, for any reason, he is personally interested in the matter of the enforcement of process. A sheriff is incompetent to act when he is an interested party in the suit or otherwise personally interested in the suit; and in such case the process issued to him or his deputy is void. This rule forbids the drawing or the summoning of the jury by the sheriff where he is a party to an action to be tried by them."

In 57 C. J. 778, "Sheriffs and Constables," Paragraph 133, the rule is laid down that:

"A sheriff or constable cannot lawfully perform the duties of his office in a case in which he is interested, even though he is not directly affected by the act to be performed."

In 35 C. J. 276, "Juries," Paragraph 240, a Sheriff's disqualification with relation to summoning jurors is dealt with as follows:

"It is essential to the fair and impartial administration of justice that the jury shall be selected and summoned by officers having no interest in the matters to be decided by it. An officer is not qualified to act in summoning a jury if he is a party to the action, a relative, or an attorney of one of the parties, a relative of deceased in a homicide case, or if he is interested in the event of the action, although not a party of record; but a very remote or contingent interest will not disqualify."

The above authorities considered, it is my opinion that the sheriff is disqualified, by reason of personal interest, to serve papers or perform any other function with relation to said grand jury investigation.

Section 47.12, Florida Statutes, 1941, contains the following provision with relation to service of process, to wit:

"A justice of the peace or a constable, in the respective counties, may serve all process in cases where the sheriff is interested, and in case of necessity the judge of the circuit court may appoint an elisor to act instead of the sheriff."

Although said Section 47.12 appears under the heading, "Civil Practice and Procedure," I am of the opinion that its terminology is broad enough to embrace process in criminal cases also.

Further, at common law the coroner may act as sheriff for a particular purpose upon the disqualification of the sheriff. 57 C. J. 772, "Sheriffs and Constables," paragraph 121; 47 American Jurisprudence 844-845, "Sheriffs, Police and Constables," paragraph 33. And at common law, where neither the sheriff nor the coroner can act, the emergency is provided for by the appointment of a special officer called an "elisor" to perform the required duties. 57 C. J. 773, "Sheriffs and Constables," paragraph 122.

Therefore, whether the court proceeds under Section 47.12 or under the common law, it is my opinion that the court has the authority to name a special officer to serve process and perform all duties in connection with said investigation which would normally be performed by the sheriff.

TRIAL PRACTICE AND PROCEDURE

February 12, 1945.—045-30.

COURT REGISTRY FUNDS—TRANSFER

QUESTIONS: 1. What is meant by the words "has been adjudicated, or is not in dispute" as used in Chapter 21993, Laws of Florida, Acts of 1943?

2. Can a transfer of court registry funds be effected under the aforesaid chapter in those cases where there is no evidence in the court files to show that the persons entitled to such funds have been notified or have knowledge of that fact, and in those cases where the court files show that funds are on deposit for persons who are unknown or not identified?

To Honorable E. B. Leatherman, Clerk of the Circuit Court, Dade County, Miami, Florida:

1. The word "adjudicated" has been defined as "judicially determined" (decided by a court), while the word "dispute" means "controversy," "argument" or "disagreement." Therefore, the words quoted in your first question can be paraphrased as follows:

"has been judicially determined or is not in controversy, argument or disagreement."

2. Since the proceeding for the transfer of court registry funds is authorized under the above chapter in every case where the right to withdraw the money deposited in the registry of the court has been adjudicated, or is not in dispute and such money has remained so deposited for at least five years unclaimed by the person entitled thereto, it is immaterial whether the funds are on deposit for unknown or unidentified persons and it is not necessary that the persons entitled to such funds be notified or have knowledge of that fact before such proceeding can be instituted. It is required as a part of the proceeding, that

the attorney general give public notice by publication once a week for four consecutive weeks in a newspaper of general circulation in the county where the funds are originally deposited that he will apply to the court for an order transferring such funds. Consequently, your second question is answered in the affirmative.

I trust that the foregoing will clarify those features of the statute made the subject of your inquiry.

JUDGMENTS AND EXECUTIONS

May 8, 1945.—045-108.

DECREES FIXING LIENS—ENTERING AND RECORDING

QUESTIONS: 1. After a decree fixing a lien on specific property has been entered by the clerk of the circuit court, is it his duty to also record that decree in the judgment lien record as provided in Sections 28.21 and 55.10, Florida Statutes, 1941?

2. If a judgment or decree should be recorded in the judgment lien record, is it the duty of the clerk of the court to prepare a certified copy for this purpose, or is it the duty of the attorney in the case to cause such certified copy to be prepared and presented to the clerk for record?

To Honorable George E. Evans, Clerk of the Circuit Court, Alachua County, Gainesville, Florida:

1. A final decree is entered in a case which is recorded by you in your chancery order book, and a final decree as entered by the court provides for a lien on certain property. You desire to know if you should also record the original in the judgment lien record as provided by Chapter 19270, Laws of Florida, Acts of 1939 (Section 55.10, Florida Statutes, 1941), or Section 28.21, Subsection 11, Florida Statutes, 1941.

I assume that the decree which you say is providing for a lien on certain property is one enforcing a lien theretofore existing against specific property such as decrees in foreclosure of statutory or contract liens. If so, it is not necessary for you to record the decree in the judgment lien record as provided by said Section 55.10 and Section 28.21, Subsection 11, Florida Statutes, 1941.

See *Nassau Realty Co. vs. City of Jacksonville*, 198 So., 581, 582, which reads in part as follows:

"We cannot agree with the contention of the petitioner, for the reason that the provisions of Chapter 19270, supra, were not intended to apply to judgments or decrees enforcing liens theretofore existing as against specific property such as decrees in foreclosure of statutory or contract liens. It was the purpose of this legislative Act to provide for the record of decrees or judgments to become a lien not on specific property already subject to the lien of the judgment but upon that real estate of the judgment debtor upon which the lien of the judgment or decree had not existed or attached prior to the entry of the judgment or decree. The purpose of the statute was not to abrogate or destroy a lien which had become merged in a judgment or decree but was for the purpose of establishing and attaching a lien under judgments and decrees in cases where no specific statutory or contract lien was the basis of the judgment or decree."

2. It is my opinion that the judgment creditor or his attorney has control of the said decree or judgment, and it is his privilege to present to you a certified copy of such decree or judgment. It is not your duty to see that the same is done. See Section 28.21, Florida Statutes, 1941.

CHANCERY JURISDICTION OVER PROPERTY

June 11, 1946.—046-256.

MURPHY ACT—VALIDITY OF PRIOR TAX CERTIFICATES

QUESTION: A deed was issued by the Trustees of the Internal Improvement Fund of the State of Florida on a lot in Inverness. It now develops that there was a personal tax certificate outstanding on the same piece of property. If the personal tax certificate is no good, how will the owner getting deed from the Trustees get the same cancelled?

To Honorable James E. Connor, Clerk and Auditor, Citrus County, Inverness, Florida:

I assume that the said owner claimed his title from the Trustees of the Internal Improvement Fund of the State of Florida by virtue of the so-called Murphy law.

I further assume that the title obtained by the owner under the Murphy law was valid.

I further assume that the so-called "personal tax certificate" is a tax certificate owned by a private individual and was more than two years old when the Murphy Act became effective.

"The effect of the Murphy Act of 1937 was to require the owners of all state and county tax sale certificates that were more than two years old when the Murphy Act became effective June 9, 1937, to apply for tax deeds on such certificates before the lands covered by the certificates became absolutely vested in the state under the Murphy Act of June 9, 1939." *Ivey v. State*, 3 So. 2d. 345, Text 349, Concurring Opinion of Justice Whitfield.

By a careful reading of the said Ivey case, it is my opinion, that a tax certificate, such as you mention, becomes for all practical purposes null and void.

As to the owner's getting such certificate cancelled, he might, if he finds this necessary, proceed under Sections 66.26 and 66.27, Florida Statutes, 1941, as amended by the laws of 1943, and construed in the case of *Beebe v. Richardson*, 23 So. 2d. 718. However, this is a point which the court, in which such a suit may be brought, must ultimately decide.

MISCELLANEOUS COURT PROVISIONS

January 10, 1945.—045-10.

FIDUCIARY—LIQUIDATION PROCESS—FORM

QUESTION: What form may be used by the fiduciary of a corporation in the process of voluntary or involuntary liquidation, in publishing a true copy of the sworn report made to the state treasurer regarding unclaimed funds in the hands of such a fiduciary under Chapter 22075, Laws of Florida, Acts of 1943 (Section 69.04, Florida Statutes, 1941, as amended)?

To Honorable J. Edwin Larson, State Treasurer:

It is my suggestion that the publication in question take the following form:

"NOTICE TO CLAIMANTS

TO ALL PERSONS HAVING ANY INTEREST IN OR CLAIM
TO THE FUNDS DESCRIBED IN THE REPORT SET FORTH
HEREIN:

Notice is hereby given pursuant to the provisions of Chapter 22075, Laws of Florida, Acts of 1943; that the undersigned on the.....day of, 194....., made a sworn report to the treasurer of the State of Florida, such report, exclusive of the verification, being in the words and figures following:"

Immediately after the foregoing should be set out in quotations a true copy of the complete report to the state treasurer, including the signature of the person making the report, but excluding the verification.

DECLARATORY DECREES, JUDGMENTS AND ORDERS

August 2, 1945.—045-215.

INDUSTRIAL COMMISSION—DECLARATORY JUDGMENT

QUESTION: May the Florida Industrial Commission bring one declaratory judgment suit (under Chapter 87, Florida Statutes, 1941, as amended) against certain oil companies (approximately twenty in number) seeking a judicial determination of the status of bulk station dealers of said respective companies under the Unemployment Compensation Law, in order to ascertain whether or not contributions heretofore paid by said companies with respect to commissions earned by said dealers should be retained by the commission or refunded to said companies?

To Honorable Burnis T. Coleman, General Counsel, Unemployment Compensation Division, Florida Industrial Commission:

Attention is directed to the decision of this court in the case of Florida Industrial Commission vs. Orange State Oil Company, 21 So. 2d. 599, in which case the above question was before the court with respect to contributions paid by said company on commissions of its bulk station dealers. You are intimately familiar with the facts of that case and the law thereof, and my comments concerning the same will not be extensive.

There seems to be little doubt that our court held in the Orange State case and in the Gentile case (10 So. 2d. 568) that for the period from the effective date of the Unemployment Compensation Law to July 1, 1941, the question of whether or not a person engaged in the performance of services for another was an "employee" or an independent contractor was to be tested by the master-servant concept at common law, and that nothing in the Unemployment Compensation Law, including the ABC provisions (now found in the law as Section 443.03 (5) (f), original provisions slightly modified) indicated a legislative intent to depart from the common-law rule.

The court recognized in the Orange State case that the following changes were made in the law effective July 1, 1941: (1) Original Section 3-E-VI-(i) of the act, as amended in 1937, was eliminated from the law; and (2) Section 443.03 (7) (g) was added to the law. The effect of these two amendments was to remove from the law the provisions limiting employment under the law to employment under the federal act; and to include in the law any employing unit (not otherwise under the state law) subject to tax under the federal law against which tax credit might be taken for contributions paid to the state fund. It is noted that to this date the federal authorities have consistently maintained that "bulk

station" dealers of oil companies were and are employees of oil companies with whom they hold contracts; although it seems that consistently the courts, when the question has been presented, have held otherwise. *Texas Co. vs. Higgins*, (2 Cir.) 118 Fed. 2d. 636; *Indian Refining Co. vs. Dallman* (7 Cir.) 119 Fed. 2d. 417; *Fahs vs. Orange State Oil Co.* (5 Cir.) 138 Fed. 2d. 743.

Among other things, it was the contention of the appellant in the Orange State case that with deletion from the law of said Section 3-E-VI-(i) the only criteria for establishing the status of "bulk station" dealers under the law were found in said ABC provisions. While in that case our court stated that "the Gentile case is still applicable and controlling here," yet the court found Orange State Oil Company's "bulk station" dealers independent contractors within the limitations of the ABC provisions. For this reason, I am unable to state with certainty that the court ruled out the contention so made. Orange State Oil Company, by mandamus, obtained a refund of approximately \$30,000 with respect to contributions paid on commissions paid its bulk station dealers.

Before any suit is brought by the commission, it should of course, ascertain the facts of the relationship existing between such companies and their respective dealers. It is understood that while in general effect the contracts existing between such companies and their dealers are similar, yet in detail they are not identical. It is further recognized that investigation is required of such relationship as to each company, because even though it were conceded that such written contracts according to their provisions did apparently make such bulk station dealers independent contractors, yet the actual relationship practiced as between the companies and their respective dealers is also necessary to determination of the question. Further attention is directed to the fact that all of said companies, even though entitled to refund, would not be interested in a common fund in the possession of the commission, but each company would have a separate claim. Thus, while the one question as to each is the status of such bulk station dealers, the establishment of such status as to each, and the claim for refund as to each, depend upon facts peculiar to each. For this reason it is felt that joining all said companies in one suit might result in multifariousness. There is no fixed rule with respect to multifariousness; but Federal Rule 20, as quoted in Barchard, *Declaratory Judgments*, page 255, seems to well state the general rule:

"All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction or occurrence and if any question of law or fact common to all of them will arise in the action."

Further reference is made to Section 63.08, Florida Statutes, 1941, relative to parties in chancery proceedings. And see *State Plant Board vs. Roberts*, 71 Fla. 663, 72 So. 175; *Murrell vs. Peterson*, 57 Fla. 480, 49 So. 31; *Farrell vs. Forrest Inv. Co.*, 74 So. 216, 73 Fla. 191; *Trust Co. of Florida vs. Crider*, 102 Fla. 593, 136 So. 434; *O'Connor-Bells, Inc., et al. vs. Washburn Crosby Co.*, 20 F. Supp. 460.

Any declaratory judgment suit brought by the members of the commission for a purpose within the meaning of the act would be tantamount to a suit by the State of Florida by them. The commission appears not to be a corporation under the law, but a state agency (Section 440.44, Florida Statutes, 1941). While Section 87.13, 1943 Supplement to Florida Statutes, 1941, in defining the "person" under the Declaratory Judgment Law who may bring proceedings thereunder, does not specifically include "state" (or any state officer or agent), therein, yet it seems that "person" as used in the law is to be defined as including "state." *State, etc. vs. General American Life Insurance Co.*, (Neb.) 272 N.W. 555.

In view of the foregoing, it would seem your inquiry is properly answered as follows:

(1) For the period prior to July 1, 1941, it would seem that the law which is determinative of the question involved as to each separate company is found in the Orange State and Gentile cases, above noted; and for the period subsequent to July 1, 1941, it would seem the determinative law is found in the ABC provisions as applied in the Orange State case. Therefore, if, after investigation, you find that the facts as to any company, respecting its bulk station dealers, are the same in law as the facts which are found in such cases for the respective periods mentioned, it would seem that the court has declared the law for you.

(2) The members of Florida Industrial Commission, a state agency, may bring suits under our Declaratory Judgment Law (Chapter 87, 1943 Supplement to Florida Statutes, 1941) for the purposes therein set forth.

(3) For the reasons above stated, it would seem that one suit brought by the commission wherein all of such oil companies were made defendants would probably infringe the rule with respect to multifariousness.

CHAPTER VII

ELECTORS AND ELECTIONS

QUALIFICATIONS

June 10, 1946.—046-252.

NATURALIZED CITIZENS—REGISTRATION

QUESTIONS: 1. Should a minor show his birth certificate to prove his age with his parents' naturalization papers?

2. Should a woman show her marriage certificate to show that she was married on or before September 22, 1922?

3. Is a passport sufficient proof as to citizenship?

4. Should people foreign born of American parents show birth certificates?

5. Where a person has registered and voted before without showing proof of citizenship can he continue to do so?

To Honorable R. A. Gray, Secretary of State:

1. I gather from your question that the person desiring to register bases his naturalization upon the fact that he was a minor when his father was naturalized.

"Naturalization confers citizenship with its rights and obligations on the person naturalized and his minor children, who although born abroad dwell in the United States, or subsequently begin to reside permanently therein. A father naturalized after his child has attained majority does not make the child a citizen." (3 C.J.S., Aliens, Par. 146.)

Therefore, if the party desiring to register bases his right of naturalization upon his being a minor when his father was naturalized, this should present to you evidence which would convince you of his age when the father was naturalized.

2. If a woman desires to prove her citizenship by a marriage to a citizen of the United States prior to September 22, 1922, she should show you her marriage certificate, or convince you in some way that she was married to a citizen of the United States prior to September 22, 1922, because since the said date an alien woman's marriage to a citizen of the United States does not because of such marriage make her a citizen of the United States.

3. The granting of a passport to a particular individual by the State Department is not conclusive that said person is a citizen of the United States (14 C.J.S., Citizens, Par. 18, Section C), nor is a passport granted by the Secretary of State of the United States reciting that a certain individual is a citizen admissible for the purpose of establishing citizenship (14 C.J.S., Citizens Par 18, Section B).

4. 8 U.S.C.A., Paragraph 6, is an act passed on February 10, 1855, providing in substance that all children born out of the limits and jurisdiction of the United States whose fathers at the time of their birth

are citizens thereof, are citizens of the United States, provided that the right of citizenship shall not descend to children whose fathers never resided in the United States.

In 1934 this law was amended and it now provides that any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother, or both, at the time of the birth of such child, is a citizen of the United States, is declared to be a citizen of the United States, provided that the citizen father or citizen mother has resided in the United States previous to the birth of such child and that in cases where one of the parents is an alien the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday and unless within six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America. This law will apply whether the parents are citizens by birth or naturalized citizens.

You would, I think, be justified in taking only the oath of such foreign born child as to his age and circumstances of his birth to meet the above conditions.

5. Every man is presumed to be a citizen of the county in which he resides. This presumption is strengthened by the fact that he voted and held office. Citizenship may be established by the showing of the exercise of the rights and the performance of the duties of citizenship. Having participated in elections and having held elective offices are facts strongly tending to establish at least a prima facie evidence of citizenship. Registration of the person whose status is in question as a voter and an assessment of a poll tax against him, are strong evidence of citizenship, but they are not conclusive (14 C.J.S. Citizens, Par. 18).

If a person desiring to register has heretofore been registered and has voted, this is a strong presumption that he is a citizen. This presumption is, however, rebuttable and even though he has previously voted in elections, if you doubt that he is a naturalized citizen, I think you would be justified in requiring him to prove his citizenship.

May 1, 1946.—046-181.

VETERANS—REGISTRATION—VOTING

QUESTIONS: 1. May returned servicemen register after the books closed on April 20, 1946; and will they be permitted to vote without registration?

2. Will the time for the polls to be open be from 7:00 a. m. to 7:00 p. m. daylight saving time or from 8:00 a. m. to 8:00 p. m. daylight saving time?

3. May illiterate persons be assisted in marking their ballots at the polls by election boards?

To Mrs. Easter L. Gates, Supervisor of Registration, Broward County, Fort Lauderdale, Florida:

(1) Servicemen are not permitted to register after the time fixed by law for the closing of the books. A person who entered the military service of the United States and remained in such service during the period when the registration books of a county were open for reregistration, is exempt from the operation of any law, general or local requiring re-registration as a prerequisite of the right to vote in any primary, general or special election, provided such person was duly registered as an elector at the time he entered such service, and whose name has not been removed from the registration books according to law. A person entitled to such exemption shall not be deprived of the right to vote in any such elections

because of failure to reregister for the reason stated, but the managers of the election may require reasonable proof of a person's military service as a ground for such exemption. Section 98.42, Florida Statutes, 1941.

A resident of a county otherwise qualified but who has never had the opportunity of registering since entering military service prior to his twenty-first birthday, and who is discharged from such service subsequent to the closing of the registration books but prior to the 1946 primaries, will not be qualified to vote in the 1946 primaries. At the close of World War I, Chapter 7950, Laws of Florida, Acts of 1919, made possible the right of a returned serviceman, situated as set forth above in this paragraph, to vote under the circumstances therein set forth. However, said law, applicable to the servicemen of such war, has expired, and no similar legislation has been provided for returning servicemen of this war. This position here taken is identical with the opinion of this office dated April 3, 1946, and bearing our No. 046-139.

(2) It is my opinion that the "time to be observed" for such opening and closing of the polls to be regulated by the customary time in standard use in such locality," as such quoted words are used in Section 99.07, 1945 Supplement to Florida Statutes, 1941, means United States standard time. Hence, under the provisions of said section it would appear that the polls shall be open on election day from 8:00 a. m. to 8:00 p. m. daylight saving time, which is 7:00 a. m. to 7:00 p. m. eastern standard time for Broward county.

(3) Illiteracy is not named as a disqualification either in Section 98.01, Florida Statutes, 1941, or in Article VI, Florida Constitution. Further, the provision for the registration of illiterate persons (see paragraph 12, Section 102.21, Florida Statutes, 1941), would seem to be a positive recognition of the right of such a person to vote; and this, apparently, is made conclusive by the provisions of Section 100.36, relating to the procedure to be followed with respect to such a person who presents himself for voting where a voting machine is used. Hence, it would seem that a person who is illiterate may have the assistance of an election official in the preparation of his ballot.

February 20, 1946.—046-62.

RELEASED FELON—CIVIL RIGHTS

QUESTION: If a person was convicted of a felony and served a sentence prior to his becoming of voting age, should that person, when he does become of voting age, be allowed to vote, his civil rights not having been restored to him?

To Florida Parole Commission:

Section 98.01, Florida Statutes, 1941, sets forth the qualifications of electors, and it therein provides that "persons who have been convicted of any felony by any court of record shall not be entitled to vote."

This identical question has not been decided as far as I can find by any of the courts of the country.

Pomeroy on Constitutional Law, Section 535, says:

"It is quite common also to deny the right of suffrage, in the various American states, to such as have been convicted of infamous crimes. The manifest purpose is to preserve the purity of the ballot box which is the only sure foundation of republican liberty, and which needs protection against the invasion of corruption, just as much as against that of ignorance, incapacity, or tyranny. The evil infection of the one is not more fatal than that of the other. The presumption is, that one rendered infamous by conviction of a felony, or other base offense indicative of great

moral turpitude, is unfit to exercise the privilege of suffrage, or to hold office, upon terms of equality with freemen who are clothed by the State with the toga of political citizenship."

In view of the purposes of the law, it is my opinion that the person you mention would have no right to vote unless and until his civil rights have been restored to him.

I can see no difference between the application of this law to one who was convicted prior to his becoming of voting age and to one who was convicted after he had become of voting age.

January 19, 1946.—046-21.

COUNTY COMMITTEE—EFFECT OF REDISTRICTING

QUESTION: Where the board of county commissioners of Dade county, in pursuance of the provisions of Chapter 22970, Laws of Florida, Acts of 1945, redistricted such county, reducing the voting districts therein from 114 to 92, effective November 27, 1945, what effect did such action have on the tenure of office of party committeemen and committeewomen elected in 1943 for a four-year term from the old 114 precincts?

To Honorable Carl Holmer, Jr., Supervisor of Registration, Miami Florida:

While the information supplied does not definitely state under what authority such board of county commissioners accomplished the redistricting of Dade county, it is assumed such action was effected under the authority of said Chapter 22970. It appears that Chapter 22970 is applicable only to Dade county. Whether or not the provisions of said act relating to the redistricting of such county and designation of voting places in the newly designated districts offends any of the provisions of Article III, Section 20, Florida Constitution, is not here decided. Furthermore, it would seem that such redistricting could have been accomplished within the provisions of Sections 98.23 to 98.26, both inclusive, Florida Statutes, 1941; however, the information is not sufficient to evidence whether this was done or not. For the purposes of this opinion, it is assumed that the redistricting of Dade county was effected in accordance with valid law; and this opinion is conditioned upon such assumption.

It is further assumed that no action was taken by the board of county commissioners under Chapter 20701, Laws of Florida, Acts of 1941, repealed by Chapter 22706, Laws of Florida, Acts of 1945.

Section 102.07(4), Florida Statutes, 1941, provides, in part, that "in the event of no election of committeemen or committeewomen, or of a vacancy occurring from any other cause in any county executive committee, the chairman of the state executive committee shall have the power to fill such vacancy by appointment from among the members of the party residing in the election district where such vacancy occurs."

That committeemen and committeewomen are not public officers seems apparent, and this is further evidenced by the fact that vacancies are filled, as aforesaid, by the chairman of the state executive committee. It is obvious that the claim of an elected committeeman to his "office" could be no greater than the claim of one elected to a "public office" created by the legislature. A public office created by the legislature may be abolished at any time by the legislature. *Jacksonville vs. Smoot (Fla.)*, 92 So. 617; *State ex rel. Watson, vs. Crooks, et al. (Fla.)*, 15 So. 2d 675.

It is apparent it was the legislative intent in Section 102.07(3), Florida Statutes, 1941, that the county executive committee should be so composed as to represent each precinct in the county; and to preserve each precinct representation on said committee by providing in said Section 102.07(4) for the filling of vacancies thereon by appointment, as aforesaid. A "vacancy in office" means "an empty place," a "place unfilled"; and a "vacancy in office" may exist regardless of whether it has ever been

filled. Opinion of the Justices, 45 N. H. 590, *Richmond v. Young*, 122 Tenn. 471, 125 S. W. 664. It is submitted that "vacancy occurring from any other cause," as used in Section 102.07(4) comprehends vacancy of representation on a county executive committee in an instance where a precinct has never been represented, as in the case of a newly created district.

There has been furnished no information as to location of the new 92 districts in relation to the old 114 districts; hence, it is not known whether boundaries of certain of the new districts coincide with certain of the old ones.

In view of the foregoing, it is my conclusion that the above question properly is answered as follows:

(1) In the redistricting of Dade county, in each instance where one of the new districts coincides as to boundaries with an old district, the precinct committeeman and committeewoman elected in 1942 for a four-year term shall continue to represent such new district until their successors are elected, as provided by law, whether there has been a change in the number of such district or not.

(2) In any instance where the redistricting has resulted in a change in the boundaries of an old district, either by enlarging or reducing it, or by consolidating one or more districts or parts of districts into a new district, vacancies exist with respect to committeemen and committeewomen for such districts.

(3) Where such vacancies have resulted in the instances aforesaid, the chairman of the state executive committee of the appropriate party may fill such vacancies by appointment, as provided in said Section 102.07(4).

December 22, 1945.—045-393.

MILITARY FORCE—REGISTRATION REQUIREMENTS

QUESTIONS: 1. Do the provisions of Section 98.42, Florida Statutes, 1941, providing in effect that a person previously registered and inducted into military service and remaining in such service during the period when the registration books of his county are open for registration, shall be entitled to vote in any primary, general or special election despite such reregistration requirements, apply to municipal elections?

2. Is it the intent of said Section 98.42 to provide that a man who became 21 years of age while in service and was discharged after the registration books had closed, that he be permitted to register and participate in a municipal election?

To Mr. Edmund H. Martin, Service Officer, Ocala, Florida:

It would seem the above questions are answered in their numbered order as follows:

(1) It would seem to have been the legislative intent that the wording "the registration books of any county," as used in said Section 98.42, was intended to comprehend all registration books in a county with respect to state, county and municipal elections. Therefore, this question is answered in the affirmative, that is to say, that such a person who was duly registered in the municipality when he entered military service is entitled now to participate in an election held in such municipality, provided he is otherwise qualified and that, during such military service, his name was not removed from the registration lists according to law.

(2) There appears to be nothing in said Section 98.42 which contemplates that a person who became 21 years of age while in service and was discharged after the municipal registration books were closed, be permitted now to register and participate in a municipal election to be held December 28, 1945.

August 20, 1945.—045-252.

SUPERVISOR OF REGISTRATION IN PALM BEACH COUNTY

QUESTION: What law prescribes the duties of the supervisor of registration of Palm Beach county, Florida?

To Honorable DeWitt Upthegrove, Supervisor of Registration, Palm Beach County, West Palm Beach, Florida:

The 1945 state census gives Palm Beach county a population of 112,311. Several population acts relating to supervisors of registration and the registration of electors have been passed which, at one time or another, according to their population brackets, included Palm Beach county. The last of these acts in point of time, which now appears to include said county in its population bracket, is Chapter 20663, Acts of 1941. Such previous acts appear no longer applicable for the reason that their population brackets do not now include said county or that they have been repealed by said Chapter 20663, in so far as the counties embraced in said latter act are concerned. It is remarked that at the time of its passage, Chapter 20663 applied only to Pinellas county.

Chapter 20663, Acts of 1941, applying to counties having a population of more than 90,000 and less than 150,000 "according to the last preceding state or federal census," among other things, provides for registration and reregistration of electors, duties and compensation of supervisors of registration, and other matters germane to the subject matter mentioned. Section 15 thereof provides that the duties of the supervisor of registration as set forth in such act shall be in addition to those provided in all general laws of the State of Florida now or hereafter in force not in direct conflict therewith. Section 18 repealed all laws and parts of laws in conflict with said act.

Subject to the remarks below, it would seem that since the 1945 state census figures have become official, the above Chapter 20663 has applied to Palm Beach county.

In the recent case of Ben L. Davis, as supervisor of registration of Escambia county, Florida vs. State ex rel. R. A. Cromwell, in the Supreme Court of Florida, the appellant urged the invalidity of Chapter 17399, Acts of 1935, applying to counties in the 70,000-140,000 population bracket, according to the last preceding state or federal census, and relating to the salary of the supervisor of registration and times for opening and closing registration books. This office assisted in the representation of the appellant in such case, and in the case the appellant contended that said chapter conflicted with the provisions of Sections 20 and 21, Article III, Florida Constitution. The court in its opinion in such case, filed July 27, 1945, held said Chapter 17399 valid as against such attack on the authority of *Ellars vs. Board of Commissioners of Orange county*, 147 Fla. 278, 3 So. 2d. 360. Appellant's petition for rehearing filed in said cause has not yet been acted upon by the court.

At this time I am not prepared to accept such finding of the court as conclusive authority that Chapter 20663 does not offend the provisions of Sections 20 and 21, Article III, Florida Constitution; and this opinion is given subject to the possibility that if ever subjected to a court test, such act might be held invalid.

In view of the foregoing and subject to the condition stated, it appears that said question is properly answered as follows:

The duties of the supervisor of registration of Palm Beach county are prescribed by Chapter 20663, Acts of 1941, and in addition thereto the general laws of this state relating to such duties are not in direct conflict with such chapter.

October 19, 1945.—045-337.

SCHOOL DISTRICT ELECTIONS

QUESTIONS: 1. If a citizen lives in one special school district and is registered in said district but owns property in another district, may he vote in special school elections in the district in which the property is owned?

2. May he vote in the district in which he is registered but does not own property?

3. If he is registered, owns property and habitually votes in primary and general elections in said district, does he have to live in that district continuously?

To Mrs. Ella Lee Lloyd, Supervisor of Registration, Jefferson County, Monticello, Florida:

It is assumed these questions refer to regular biennial school district elections.

It appears that these questions have been dealt with in an opinion of this office, dated August 18, 1945, our No. 045-247, a copy of which is hereto attached. By reference to such opinion, and subject to comment therein, it appears the above questions properly are answered in their numbered order as follows:

1. This question is answered in the negative. A qualified elector in all biennial school district elections is an elector residing within the district and whose registration is within such district and who pays a tax on real or personal property within the district.

2. This question is answered in the negative. Reference is made to the comment in preceding paragraph 1. However, it is explained that the situs of the personal property for the purposes of taxation in a county is the place of residence in the county of the owner thereof, if such a place of residence exists. Thus, if a resident of a school district is assessed and pays a tax in said district on personal property actually located in another district, he is one "who pays a tax on real or personal property within the district" of his residence, as contemplated by Section 230.32 (2) (d), Florida Statutes, 1941.

3. I am a little uncertain as to the exact meaning of this question. For the reason set forth in above paragraph 1 he must reside in the district where the election is held. The word "reside" has a rather technical meaning in law; and it is felt that any general statement unrelated to specific facts would be of little benefit to you. Whether or not a person does "reside" within a district within the meaning of the laws referred to in the attached opinion must depend upon the facts of the individual case.

November 14, 1945.—045-357.

NATURALIZED CITIZEN—RESIDENCE REQUIREMENTS

QUESTION: Does a naturalized citizen, who has been a resident of Florida for five years, need to have his citizenship papers for one year before taking the oath as a registrant?

To Mrs. Easter L. Gates, Supervisor of Registration, Broward County, Fort Lauderdale, Florida:

Section 98.01, Florida Statutes, 1941, provides that every person of the age of 21 years and upwards who shall at the time of registration be a citizen of the United States, and shall have resided and had his habitation, domicile, home and place of permanent abode in Florida for one year and in the county for six months, shall, if otherwise qualified accord-

ing to law in such county, be deemed a qualified elector at all elections under the Constitution of Florida. This section further provides that naturalized citizens of the United States at the time of and before registration shall produce to the registration officer their certificates of naturalization or duly certified copies thereof and make the oath required by this section of law.

It is remarked that the above law which is found in said Section 98.01, is a repetition of the matters appearing in Article VI, Sections 1 and 2, Florida Constitution.

In view of the foregoing, it appears that the above question properly is answered as follows:

If the person contemplated by the above question has resided and has had his habitation, domicile, home and place of permanent abode in Florida for at least one year and in the county for at least six months, immediately upon becoming a naturalized citizen, if otherwise qualified according to law, he is entitled to be registered as an elector of such county.

March 13, 1946.—046-98.

FELONS—MILITARY DISCHARGE—CITIZENSHIPS

QUESTION: If a citizen of Florida has lost his right of franchise by reason of any of the provisions of paragraphs (4) and (5), Section 98.01, Florida Statutes, 1941, and similar provisions of Article VI, Section 5, Florida Constitution, does an honorable discharge from military service subsequently issued to him restore him to such right of which he was deprived, as aforesaid?

To the State Director of Selective Service, State Headquarters, St. Augustine, Florida:

Section 98.01, Florida Statutes, 1941, provides that, among other mentioned classes, the following shall not be entitled to vote: Persons who may have been convicted of any felony by any court of record (Par. 4, said Section 98.01); and persons who may have been convicted of bribery, perjury, or larceny, or of any infamous crime in any court of this state, or any other state, or interested in any bet or wager the result of which shall depend upon an election, or who shall fight a duel or engage in any of the activities in connection therewith as detailed in said law (Par. 5, said Section 98.01). The grounds for loss of franchise set forth above are also found in Article VI, Sections 4 and 5, Florida Constitution.

Article IV, Section 12, Florida Constitution, gives to the pardon board of Florida the power to grant pardon after conviction, in all cases except treason and impeachment subject to such regulations as may be prescribed by law relative to the manner of applying for pardons. Section 940.05, Florida Statutes, 1941, provides that all persons who have received or may receive full pardon from the board of pardons shall be entitled to all the rights of citizenship enjoyed by them before their conviction, whether the pardon is granted before or after the expiration of sentence or the payment of penalty.

The pardoning power thus conferred upon the board of pardons by the above constitutional provision in all cases except treason and impeachment, is exclusive. *Singleton v. State*, 38 Fla. 297, 21 So. 21, 34 L. R. A. 251.

The power of Congress over the right to vote in the several states is confined to enforcement of the Fifteenth Amendment, U. S. Constitution, by preventing discrimination on account of race, color or previous condition of servitude. *Neal vs. Delaware*, 103 U. S. 370, 26 L. Ed. 567; *Williams vs. Mississippi*, 170 U. S. 213, 42 L. Ed. 1012.

In view of the foregoing, in my opinion the above question properly is answered as follows:

Since the qualifications of a voter in Florida depend upon the requirements of the state, one who has been disqualified to vote because of any act placing him in one or the other of the classes set forth above in Paragraphs (4) and (5) of Section 98.01, Florida Statutes, 1941, must obtain restoration to rights of citizenship (and the right to vote) by full pardon issued by the board of pardons of this state. Hence, it would appear that honorable discharge from the military service of the United States would not restore the rights of citizenship (and the right to vote) to the person described in the above question.

March 14, 1946.—046-100.

VETERAN—REGISTRATION

QUESTION: May a person who was in the military service of the United States and who, at the time of induction into such service, was a duly registered elector and who was discharged from military service after the registration books closed for the re-registration of electors but prior to the primary elections, vote in such elections?

To Honorable Charles W. Luther, County Attorney, Volusia County, Daytona Beach, Florida:

The question is to be construed as assuming that the above person did not change his domicile and place of permanent abode during such military service, and that his voting place now is where it was prior to induction into such service.

On the authority of the provisions of Section 98.42, Florida Statutes, 1941, it is my opinion that the above question properly is answered in the affirmative. Your attention is called to Paragraph (2) of said Section 98.42 which provides that "the managers of an election may require reasonable proof of the person's military service as a ground" for the exemption provided by such section. Whether or not such persons were duly registered at the time of induction into military service should not be difficult to ascertain. It would seem that one way to establish the fact of such prior registration would be by registration receipt evidencing the same.

February 15, 1946.—046-89.

STUDENT REGISTRATION—RESIDENCE

QUESTION: Is the supervisor of registration of Alachua county, Florida, required to register students of the University of Florida?

To Miss Sue Simpson, Supervisor of Registration, Alachua County, Gainesville, Florida:

It is assumed that the registration of electors in Alachua county is governed by the general registration laws of the state. This opinion is conditioned upon such assumption.

Section 98.01, Florida Statutes, 1941, (see also Article VI, Section 1, Florida Constitution) provides that every person of the age of twenty-one years and upward, who shall at the time of registration be a citizen of the United States, and shall have resided and had his habitation, domicile, home and place of permanent abode in Florida for one year, and in the county for six months, shall, if otherwise qualified according to law in such county, be deemed a qualified elector at all elections under the constitution.

Section 98.11, Florida Statutes, 1941 (see also Article VI, Section 3, Florida Constitution), sets forth the oath required by an applicant for registration as an elector for the general election. It will be noted that the applicant who subscribes to the required oath asserts thereby that he possesses those qualifications for voting required by Article VI, Section 1, Florida Constitution.

Sections 102.19 and 102.21, Florida Statutes, 1941, set forth the information and oath required of one registering as an elector for primary elections. Said Section 102.19 provides among other things, that, "The following form of oath shall be printed in the column in which the word 'oath' appears: 'I, having been first duly sworn, say, upon oath, that the statements here entered opposite my name, as to my qualifications as an elector, are true.' The supervisor of registration shall administer this oath; and he shall also administer the oath required by Section 3 of Article VI of the Constitution of Florida, in the manner prescribed by Section 98.11."

Thus, it will be observed that the applicant for registration as an elector for primary elections under oath asserts, among other things, that he possesses the qualifications prescribed by Article VI, Section 1, Florida Constitution. A person who does not possess such qualifications cannot properly make the oath required for registration as an elector for primary or general elections.

In view of the foregoing, it appears the above question properly is answered as follows:

If a person applies to such supervisor of registration for registration as an elector for the primary or general election, and makes the oath required by law in connection therewith, such officer should permit said person to register, subject to the exception in the succeeding sentence. If said officer should ascertain by interrogation that the applicant for registration does not reside in Alachua county or is not otherwise qualified to register as an elector, as provided and described in said Section 98.01, the officer properly should refuse to register the applicant. It is assumed, of course, that no one reasonably would make such required oath lightly, yet it is pointed out that the gravity of asserting the possession of these required qualifications is reflected in the penalty prescribed by Section 875.14, Florida Statutes, 1941, for one found guilty of wilful and corrupt false swearing, or affirming, when interrogated as to his qualifications as an elector.

September 3, 1946.—046-371.

REGISTRATION—CLOSING DATE—GENERAL ELECTION

QUESTION: Under the provisions of Section 98.22, Florida Statutes, 1941, what is the closing date for the registration books for the 1946 general election?

To Mrs. J. P. Blakeslee, Supervisor of Registration, Stuart, Florida:

Said Section 98.22 provides that said registration books shall be kept open "until the second Saturday of the month preceding the day in each year in which there is a general election," and the "registration books of each county shall be closed on said second Saturday of the month preceding the day in each year in which there shall be a general election."

In the case of *State ex rel. Slay et al. vs. White, Tax Collector*, 73 Fla. 426, 74 So. 486, in construing wording quite similar respecting the payment of poll taxes under Sections 170, 202 and 204, General Statutes of Florida of 1906, the court stated:

"The word 'month' as used in the statutes above quoted means a calendar month, or that period of time elapsing **between** a given date and the corresponding date of the next preceding month by name." (Emphasis supplied).

In the case of *Hodges vs. Filstrup*, 94 Fla. 943, 114 So. 521, the court, in construing the word "between" stated: "The word 'between' when used in speaking of the period of time between two days, generally excludes the days designated as the commencement and termination of such period." If such rule were applied to the word "between" as used in the above quoted language from the *White* case, the "month" preceding the 1946 general election would be that period of time from October 6, 1946, to November 4, 1946, both dates inclusive; in which event the second Saturday would be October 19, 1946. I consider that the better rule would be to hold that "the month preceding the date of" the 1946 general election designates the period of October 6, 1946, to November 4, 1946, both dates inclusive, in which event the second Saturday of such month would be October 12. However, such would seem to conflict with the quoted provisions of the *White* case above if we are to attach to the wording employed by the supreme court there its reasonable and ordinary meaning and effect.

In view of the foregoing, in my opinion the above question properly is answered as follows:

Under the provisions of said Section 98.22, the closing date of the registration books of the 1946 general election is October 19, 1946.

September 18, 1946.—046-400.

NEW ELECTION DISTRICTS—CREATION

QUESTION: When a board of county commissioners, at a meeting in September, 1946, redistricted the county commissioners' districts in the county, and in so doing caused two new election districts to be created, should these two new precincts be set up and put into effect for the 1946 general election, in view of the provisions of Section 98.23, Florida Statutes, 1941?

To Honorable Roy J. Oglesby, Supervisor of Registration, Santa Rosa County, Milton, Florida:

Only the board of county commissioners is charged with the duty and/or vested with authority to change county commissioners' districts (Article VIII, Section 5, Florida Constitution) and to change election districts (Sections 98.23-98.26, Florida Statutes, 1941).

It is assumed that the creation of two new election precincts by the above board arose out of and was a necessary incident of the change of boundary lines of such commissioners' districts by said board, in meeting the requirements of certain of the provisions of Article VIII, Section 5, Florida Constitution.

Since it is stated that said two new election districts have been created, it is assumed that such may be accepted as an accomplished fact; and it would seem that you, as supervisor of registration, should so recognize them. However, the effect of the creation of new election districts as incidents of a change in boundaries of commissioners' districts is made the subject of brief comment.

When the county commissioners, by direct action, alter or change election districts, they must do so in conformity with the provisions of Section 98.23-98.26, Florida Statutes, 1941, among which is that provision that such action may be taken "at any time prior to the first day of July of any year in which there shall be a general election." Thus, in view of

such quoted provision of said Section 98.23, a board of county commissioners would not be authorized to alter or change election districts in September, 1946, unless such change were an incident of such board's action, as related in the succeeding paragraph.

Article VIII, Section 5, provides, among other things, that county commissioners' districts shall be as nearly as possible equal in proportion to population, "and the board of county commissioners in the respective counties shall from time to time fix the boundaries of such districts." Under such constitutional provisions, the clear and specific duty rests upon a board of county commissioners to make the several districts as nearly as possible equal in proportion to population, and the duty to comply with such mandate is a continuing one, and mandamus will lie to coerce a board to perform such duty. *Prince vs. State (Fla.)*, 25 So. 2d. 5. In that case the court, in differing with the view of the lower court that county commissioners' districts shall be so created as to conform to election districts, stated further:

"It is the view that the county commissioners' districts may be created so as to be as nearly as possible equal in proportion to population and then the election districts may be changed to conform to the county commissioners' districts."

In view of the foregoing, in my opinion the above question properly is answered as follows:

If as result of the board of county commissioners fixing new boundaries of the county commissioners' districts in their county, in pursuance of and compliance with Article VIII, Section 5, Florida Constitution, it is necessary to create new election districts as an incident of such changed boundaries of county commissioners' districts, the provision of said Section 98.23 that election districts may be altered or changed "at any time prior to the first day of July in any year in which there shall be a general election" does not control with respect to such changed election districts. It was proper for such board of county commissioners to fix new boundaries of commissioners' districts in September, 1946, if done in pursuance of the provisions of Article VIII, Section 5, Florida Constitution; and after such action was taken, it was proper for said board to conform election districts where required to the changed county commissioners' districts, despite the above quoted provisions of said Section 98.23. Hence, it would seem that such two new election districts, mentioned in said question, should be recognized as in existence now in relation to the 1946 general election.

HOLDING ELECTIONS AND ASCERTAINING THE RESULTS

May 21, 1946.—046-213.

PRINTING NAME ON BALLOT—METHOD

QUESTION: Is the board of county commissioners authorized to have printed on the general election ballot as a candidate for office the name of a person set forth in a petition signed by electors?

To Honorable George W. Scofield, Scofield & Scofield, Inverness, Florida:

It appears to me that you have arrived at a correct conclusion in this matter as set forth in your letter. It is apparent that Section 99.10, Florida Statutes, 1941, controls as to those names which a board of county commissioners is permitted to have printed on the general election ballot as candidates. There is no provision in said section which permits the nomination of a candidate by petition so as to entitle his name to be printed on such ballot.

September 21, 1946.—046-392.

FORM OF BALLOT—HEADINGS

QUESTION: What should be the form of ballots for submitting the six constitutional amendments to the voters to be voted upon at the general election of 1946?

To Honorable R. A. Gray, Secretary of State:

As to No. 1 (Article XX, Sections 1 and 2) should read "An amendment to the Constitution of the State of Florida, to be known as Article XX, Sections 1 and 2 thereof, relating to the consolidation, abolishing or creating of certain county offices, excepting judges of all courts, and for the assessment, collection, accounting and disbursement of municipal taxes and assessments by county tax officers, in Orange county, Florida, and providing for referendum elections for acceptance and rejection of any law or laws enacted by the Legislature of Florida as provided therein."

As to No. 2 (Article VIII, Sections 11 and 12) should read as follows: "To amend Article VIII, Sections 11 and 12, of the Constitution of the State of Florida as adopted at the general election of 1944, providing for the renumbering of said Sections and to amend said Sections 11 and 12, providing that in the county of Hillsborough, State of Florida, the county tax assessor thereof shall assess all property for all state, county, county school board, school districts, special tax school districts and municipalities; providing that the county tax collector of said county shall collect all taxes so levied, and providing that the powers, functions, duties and compensation of said assessor and collector shall be fixed from time to time by the Legislature of Florida but exempting Plant City, Florida, from the provisions of said amendment."

As to No. 3 (Article VIII) change to read "To amend Article VIII of the Constitution of the State of Florida by adding thereto additional sections providing that the county tax assessor of Bay county, State of Florida, shall assess all property for all state, county, school and municipal taxes to be levied in said county by state, county, county school board, school districts, special tax school districts and municipalities; providing that the county tax collector shall collect all taxes so levied and providing that the powers, functions, duties and compensation of said assessor and collector shall be fixed from time to time by the Legislature of Florida."

As to No. 4 (Article XVI) change to read "To amend Article XVI of the Constitution of the State of Florida by adding an additional section providing for the appointment, by a concurrent resolution of the Senate and House of Representatives, of a director of the budget and to authorize the legislature to prescribe his powers, duties, qualifications and term of office."

As to No. 5 (Article III, Section 30) change to read "To amend Section 30 of Article III of the Constitution of the State of Florida providing laws making the appropriations for the salaries of public officials and employees and all other expenses of the State shall contain provisions on no other subject nor shall an appropriation be an incident of any other bill; all state appropriations, except appropriations for the county schools, counties, cities, or other political subdivisions of the state, appropriations for permanent improvements and buildings for state institutions as provided for by laws enacted at the 1945 Legislature or prior legislatures and for pensions, retirement funds and trust funds, shall be included in one general appropriation bill or any amendment or supplement thereto, and shall be for no longer than two years. All appropriations made prior to the adoption of this section which are contrary to the provisions of this section shall expire as of July 1, 1947."

As to No. 6 (Article V) change to read "To amend Article V of the Constitution of the State of Florida by adding an additional section pro-

viding that the judge of the court of record for Escambia county and the county solicitor of said county shall hereafter be elected by the qualified electors of said county and providing for the first election of the said judge and the said county solicitor to be held at the general election in 1948; fixing the beginning and length of their terms and providing any vacancies prior to that date shall be filled in a manner not to extend beyond January, 1949; providing vacancies shall be filled by appointment by the governor and confirmation by the Senate and for the expiration date of such appointments."

October 16, 1946.—046-435.

FILL-IN VOTING—STICKERS

QUESTIONS: 1. May a sticker with the name of a person printed thereon be used by a voter for filling in the name of such person as the candidate of this choice for a particular office in the blank space provided on the general election ballot?

2. Properly how may a voter fill in and vote for a candidate on the general election ballot for a particular office, the name of such candidate not being printed upon said ballot?

To Mr. C. H. Taylor, Jr., Representative Hardee County, Wauchula, Florida:

Section 99.29, Florida Statutes, 1941, concerns the manner in which general election ballots are voted, and provides, among other things, in effect, that upon receiving the ballot the elector shall forthwith retire alone to one of the voting booths provided for that purpose and there prepare his ballot by marking with pen and ink or pencil in the appropriate margin or place a cross mark before the name of the candidate of his choice for each office to be filled," or by filling in the name of the candidate of his choice in the blank space provided therefor, and marking the cross mark (X) in the appropriate margin."

In view of the foregoing, in my opinion the above questions are answered in their numbered order as follows:

(1) In view of the wording and apparent intent of said Section 99.29, I can see no objection to the use of stickers for voting as contemplated by this question; but such stickers may not be distributed at the polls for such use.

(2) Under said Section 99.29, an elector may vote for a "write-in" candidate on the general election ballot by writing "the name of the candidate of his choice in the blank space provided therefor, and marking the cross mark (X) in the appropriate margin." If a sticker is used as contemplated by the first question, after the sticker is affixed on the blank line, to constitute a vote for the candidate whose name is on the sticker, the voter must "mark the cross mark (X) in the appropriate margin" on the ballot.

July 23, 1945.—045-198.

CONSOLIDATION OF SCHOOL DISTRICTS—QUALIFICATIONS, ETC.

QUESTIONS: 1. What electors are qualified to vote in elections under Chapter 23226, Acts of 1945,

(a) If in the special tax school districts, how many voting places to the voter or elector must also pay taxes on real or personal property, must the property be situate within the district of the voter's residence?

(b) If payment of these taxes is required, how is that fact to be determined; that is, by the certificate of the supervisor of registration or by the affidavit of the voters at the time of presenting themselves at the polls?

- (c) May the clerks and/or inspectors of election administer this oath?
2. Must voting places be established in each of the 114 county election precincts or in the ten several special tax school districts?
- (a) If in the special tax school districts, how many voting places to each and what method shall be used to determine adequate provisions to accommodate all voters?
- (b) Where shall a voter whose precinct and polling place is outside the special tax school district of his residence cast his ballot?
3. Does House Bill 482 and particularly Sections 6 and 8 thereof repeal Section 236.32, Subsection 3, Paragraph 1, providing:
- "to authorize the consolidation of said district, it shall be required that at said election a majority of the votes cast in each of the districts proposed to be consolidated shall be in favor of consolidation,"
- or is a majority of the voters of the county as a whole sufficient?
4. How is the provision that "no more than one trustee shall come from any one district for which a county commissioner is provided for by law" to be construed?

To Honorable Colin English, State Superintendent of Public Instruction:

Assuming that the act is constitutional, a question which I refrain from considering, it will be necessary to determine whether, on the one hand, it was the intention of the legislature in enacting Chapter 23226 to provide a complete substitute for the general statute relating to consolidation of districts, Section 236.32 (3), Florida Statutes, 1941, or, on the other hand, whether the provisions of Section 236.32 (3) are to be read into the chapter, except in so far as any part of it may be in conflict with the local act. The legislative intent in that respect is not clear, but certain considerations, such as the inclusion in the chapter of most of the important provisions of Section 236.32 (3), which otherwise need not have been included, the fact that the bill provides a complete procedure for consolidation, and the bill as a whole, lead me to believe that it was the intention of the legislature to enact a pro tanto substitute for the general statute, and that, therefore, procedure and all other matters are to be determined from the provisions of the chapter itself. In other words, none of the provisions of Section 236.32 (3) which were omitted from the special act are applicable.

Article XII, Section 10, of the Constitution, reads as follows:

"The legislature may provide for the division of any county or counties into convenient school districts; and for the election biennially of three school trustees, who shall hold their office for two years, and who shall have the supervision of all the schools within the district; and for levying and collection of a district school tax, for the exclusive use of public free schools within the district, whenever a majority of the qualified electors thereof that pay a tax on real, or personal property shall vote in favor of such levy; provided, that any tax authorized by this section shall not exceed ten mills on the dollar in any one year on the taxable property of the district."

A careful reading of the provision clearly shows that the legislature is authorized to make provision for three things, (1) division of the county into school districts, (2) biennial election of trustees, etc., and (3) levy and collection of district school taxes whenever a majority of the qualified taxpayers of the district vote in favor of the levy. The requirement that the voter be a taxpayer is in the third division, that is, when the question submitted to the voters is the levy of a tax. There is no such tax-paying requirement in any election concerning either of the other two parts of

the provision. Chapter 23226 provides for a referendum to determine whether or not the several school districts of Dade county shall be consolidated into one district and for the election of trustees. There is nothing in the act providing for a vote on a tax levy or millage. Accordingly, it is my opinion that every voter qualified for a general election is entitled to vote. This makes it unnecessary to answer questions (a), (b), and (c) under question 1.

It will be observed that in Sections 6 and 8 of the chapter it is provided that a vote be taken of the qualified electors of the county and that it shall take effect upon the approval by a majority of the qualified electors of said county. From this I conclude that it was the intention of the legislature that the vote be county-wide and may be taken in county election precincts as in any general election, and that a majority of the votes of the county as a whole is sufficient. This is in answer to your second and third questions.

I have restated your last question, eliminating the hypothetical situations which you mentioned. I do not ordinarily answer such questions. If the results which you mention should occur, which is not at all likely, the question may then be submitted for an opinion. The question of who shall have been elected trustee may be determined in this manner: First, determine who received the highest number of votes in each of the county commissioners' districts. The three of those persons who receive the highest vote are the trustees of the consolidated district.

September 24, 1946.—046-397.

SPECIAL COUNTY ELECTION—FORM OF BALLOT

QUESTIONS: 1. Is it necessary that the county commissioners take any official action providing for the submission to the voters of Chapter 23438 at the 1946 general election?

2. Is it mandatory that they provide at this election for the submission of such act to the voters of Orange county.

3. Does the provision that the ballot shall contain the words "for ratification of the teachers' tenure act" and "against ratification of the teachers' tenure act" limit what the ballot shall contain, or should the title of the act be printed thereon or the entire chapter?

To Messrs. Fishback, Smith and Williams, Attorneys for the Board of County Commissioners, Orange County, Orlando, Florida:

It is here assumed that the duty of the preparation of the general election ballot devolves upon the board of county commissioners as is provided by the general law with respect thereto, viz.: Section 99.10, Florida Statutes 1941, and this opinion is conditioned upon that assumption. If any special law applicable to Orange county provides otherwise, this office should be notified or you should take that into consideration in construing the import of this opinion.

It is my opinion that the questions are properly answered as follows:

(1) Proceeding upon the theory that Orange county is governed by the general law concerning the officials who shall prepare the ballot, we find from Sections 99.10 and 99.18 the clear implication that the ballot shall be prepared by the board of county commissioners and not by the supervisor of registration. The wording of Section 8 of said Chapter 23438 is, in my opinion, susceptible of this construction, that while it is true the county commissioners under this section were given the right to call a special election to submit the matter of this law to the voters of Orange county, it seems clear to me that unless they provided for such a special election prior to the first general election following the passage of said act, it is mandatory that the act be submitted at this general election. Otherwise, the county commissioners could let the matter drift indefinitely and it is pointed out at this time it has drifted since June, 1945.

(2) I think this question perhaps is surplusage and is comprehended by the first one.

(3) While it is mandatory that there appear on the ballot the quoted words required by Section 8 of said Chapter 23438, I know of no reason why on the ballot the whole act could not be printed or the title thereof or the substance of the law be printed preceding the required quoted words, if the board of county commissioners deems this desirable.

VOTING MACHINES

September 21, 1945.—045-288.

USE IN ELECTION FOR SCHOOL DISTRICT TRUSTEES

QUESTION: Is the use of voting machines mandatory in the election of school district trustees for the consolidated school district, formed by Chapter 23226, Special Acts of 1945, for Dade county?

To Honorable Colin English, State Superintendent of Public Instruction:

Chapter 23226, Special Acts of 1945 (also known as House Bill 482), provided for the consolidation of all school districts in Dade county into one district which will be co-extensive with the boundaries of the county. The act provides a referendum, which I presume has been held, and for the election of trustees for the consolidated district. The consolidated district is effective from January 1 following the referendum election, and the "trustees thereof shall take office on the first Tuesday after the first Monday in January following said election."

Although Section 228.11, Florida Statutes, 1941, provides that "when-ever voting machines are authorized to be used in general or primary elections in any county, the county board may, in its discretion, require such machine to be used in any other elections provided for under the school code," in my opinion the election in question is a general election, or an election in the nature of a general election, and therefore not any other election in which the board may use its discretion. Furthermore, Section 236.32 provides that "all school district elections shall be held and conducted in the manner prescribed for holding general elections, except as provided in this chapter" (that is, Chapter 236). Chapter 100, Florida Statutes, 1941, provides for the holding of general elections in counties using voting machines, Section 100.43 of which chapter provides that "in all counties where voting machines have been adopted the same shall be used in all general, special, primary and municipal elections."

Section 100.43 was first enacted as Section 3B of Chapter 22018, Acts 1943. An investigation of the legislative history of said section reveals that it was not in the bill as introduced into the legislature but was added as an amendment, after a committee has recommended that it do not pass. The legislature evidently intended to require that voting machines be used in all elections in counties using such machines. If it had not so intended it would never have amended the law from the floor to contain the above provision.

I am, therefore, of the opinion that the use of voting machines is mandatory in the election of school district trustees for the consolidated school district formed by Chapter 23226, Special Acts of 1945, for Dade county.

ABSENT VOTERS

April 3, 1946.—046-139.

UNREGISTERED VETERAN—QUALIFIED TO VOTE

QUESTION: May a resident of a county who is otherwise qualified but who has never had the opportunity of registering since entering military service prior to his twenty-first birthday, and who will be discharged from such service subsequent to the closing of the registration books in such county, but prior to the 1946 primaries, vote in such primary elections?

To Honorable Hugh E. Carlton, Supervisor of Registration, Polk County, Lakeland, Florida:

You remark that Section 249, Compiled General Laws, 1927, covered this situation, but that you cannot find that it has been incorporated in Florida Statutes, 1941. Said Section 249 was originally Chapter 7950, Laws of Florida, Acts of 1919, and the title thereof referred to a soldier, sailor or marine in the "World War." This explains, no doubt, why, in Volume II, Annotations, Florida Statutes, 1941, page 1239, there is the indication that the law is not carried forward as a part of such latter statutes, and the notation that the law has expired.

The benefits of the provisions of Sections 101.11-101.19, Florida Statutes, 1941, providing for members of the armed forces voting absent ballots, are confined to "registered qualified" electors of Florida. Section 98.42, Florida Statutes, 1941, preserving to a returned member of the armed forces who was absent in such service during a reregistration period the right to vote, premises such right on a prior registration.

It does not appear that a law, similar in import to said Chapter 7950 enacted at the conclusion of World War I, was enacted with respect to the servicemen of World War II situated as this serviceman is.

In view of the foregoing, in my opinion, the above question is answered as follows:

It is to be regretted that it appears the above question must be answered in the negative, i. e., that under the circumstances related in the question, this returning serviceman will not be qualified to vote in the 1946 primaries.

PRIMARY ELECTIONS

October 4, 1946.—046-413.

COUNTY CANDIDATE—SELECTION BY COMMITTEE

QUESTION: The tax assessor of Wakulla county died on September 30, 1946, he having been elected to such office at the general election in 1944 for a regular four-year term. What, if any, steps should be taken to provide a candidate for such office whose name properly may be printed on the ballot for the 1946 general election?

To Honorable G. J. Langston, Clerk of the Circuit Court, Wakulla County, Crawfordville, Florida:

Section 102.48, Florida Statutes, 1941, provides, in part, that if such a vacancy as above recited occurs in a county office, the county executive committee shall call a primary election to provide a nominee for such office, and that if no candidate in said primary receives a majority of the votes cast in such primary, a second primary shall be held within ten days thereafter; provided, however, that if such vacancy occurs less than thirty days before the general election, the county executive committee shall select a nominee for said office.

Section 99.10, Florida Statutes, 1941, provides, in part, that the county commissioners shall cause to be printed on the ballots to be used at the general election only the names of the candidates who have been put in nomination, as therein set forth, when same shall have been certified and filed with them not more than sixty days nor less than twenty days previous to the day of such election. It appears that under this law, October 16, 1946 is the last day the names of such candidates may be certified to and filed with the board of county commissioners in order for their names to be printed on the ballot for the 1946 general election.

Section 101.07, Florida Statutes, 1941, contemplates that official ballots shall be prepared and a sufficient number thereof delivered to the

county judge not less than fifteen days prior to the general election, for use of electors who expect to be absent from their home county on election day. The fifteenth day prior to the day of the general election this year is October 21, 1946.

It would seem unreasonable that the provisions of said Sections 99.10 and 101.07 would be forced to yield to permit the time required for the holding of a special primary or special primaries to select a nominee for an office whose name may be printed on the general election ballot, and I do not consider such was the legislative intent. Further, it would seem that if there is sufficient time for the holding of a special primary or special primaries, as provided by said Section 102.48, such should be held; but on the other hand, if obviously the time permitted for the holding of the same is insufficient for that purpose, then it would appear that no adequate method for selecting a nominee is afforded by such primary or primaries.

To hold such special primary or primaries, certain essentials must be observed, among which are the following: (1) appropriate action by the county executive committee calling the primary and prescribing rules where the general primary laws are not applicable because of the shortness of time; (2) adequate notice to the electors of the county of the holding of such primary or primaries; (3) fixing a date by which candidates may qualify; (4) action of the board of county commissioners in having the ballot prepared, containing the names of candidates duly qualified in said primary; and in appointing and giving notice of requisite inspectors and clerks for the several county voting districts; (5) canvassing of the vote; and (6) the holding of a second primary, if required, which would contemplate the preparation and printing of ballots, appointment of inspectors and clerks, and the canvassing of the vote.

It is noted that between this date and the last date upon which names of nominees may be certified to and filed with the county commissioners for printing on the general election ballot, but eleven days intervene.

Since it appears that the office of tax assessor is an elective office under our Constitution, it would seem that by the provisions of Article XVIII, Section 6, Florida Constitution (as amended, general election, 1944), an appointment to fill the vacancy occasioned by the death of this office holder would extend only to the first Tuesday after the first Monday in January, 1947. This being true, properly a person should be elected at the general election this year for that part of the unexpired term to which this deceased tax assessor was elected commencing on the first Tuesday after the first Monday in January, 1947. Article XVIII, Section 7, Florida Constitution (as amended, general election, 1944).

In view of the foregoing, in my opinion the above question properly is answered as follows:

Since it appears that insufficient time exists for the holding of a special primary or special primaries, as contemplated by said Section 102.48, the party county executive committee properly should select a nominee for this office to be voted for in the 1946 general election. If such nominee is so selected and certified to the board of county commissioners not less than twenty days previous to the day of the general election, as provided in and contemplated by said Section 99.10, then the name of such candidate should be printed on the general election ballot.

September 3, 1946.—046-389.

COUNTY COMMISSIONERS—REDISTRICTING—ELECTION

QUESTION: The Volusia county commissioners, agreeable to Section 5 of Article 8 of the Constitution on August 19, 1946, have redistricted the county commissioners' districts. Two of the county commissioners, now serving in districts 2 and 4 as they formerly existed before redistricting, were elected to office and their terms of office will not expire until

January 1, 1947. (1) May the old districts stand as they were until the time of the closing of the terms of the commissioners in said districts 2 and 4, and (2) what effect will the redistricting have on the budget which was made and adopted for the fiscal year beginning October 1, 1946 and running until September 30, 1947?

To Honorable Jess Mathas, Clerk of the Circuit Court, Volusia County, DeLand, Florida:

Under Section 102.55, Florida Statutes, 1941, the commissioners are nominated in the primary by the several districts of the county instead of by the county at large; however, under Section 5 of Article 8 of the Constitution, they are elected by the qualified electors of the entire county.

Under Section 5 of Article 8 "the board of county commissioners in their respective counties shall from time to time fix the boundaries of such districts."

"A change of boundary line of commissioner districts, or a redistricting, does not deprive a county commissioner of the right to hold office for the rest of his term although by reason of the change his residence is without the district from which he was elected, provided it is still within the county." *Brungardt vs. Leiker*, 21 Pac. 1065; *Norwood vs. Holden*, 47 N.W. 971; *State vs. Haverly*, 87 N.W. 959; *State vs. Milwaukee County*, 21 Wis. 443.

In my opinion, the effect of redistricting should take effect as and when the same is intended to be done by the county commissioners. The county commissioners elected, regardless of redistricting, will hold office for the terms for which they have been elected.

The county commissioner nominated by District No. 1 and elected by the county before the redistricting is now county commissioner for District No. 1 after the redistricting. The commissioner nominated by District No. 2 and elected by the county before the redistricting is now county commissioner for District No. 2 after the redistricting, and so on, regardless of where the county commissioners may live, provided they live within the county.

As said before, in my opinion, the effective date of the redistricting is when the county commissioners actually intended to redistrict the said county, and inasmuch as the county commissioners are by Section 5 of Article 8 not elected at the same time; county commissioners from the even districts being elected at one time and county commissioners from the odd numbered districts, 1, 3 and 5, being elected at another time, to hold otherwise would, as can be readily seen, create the utmost confusion. Had the said Section 5 of Article 8 read so that all of the commissioners were elected at one and the same time, it might be that the effect of the redistricting would be prospective, but inasmuch as the commissioners are not elected at the same time, but two are elected at one time and three at another time, I cannot hold the redistricting to be prospective.

In answer to your second question, I do not see where the redistricting should effect the general items in your budget, but it should be carried out as adopted, but as to specific items I can make no decision thereon without further information.

September 4, 1946.—046-367.

VACANCY IN OFFICE—NOTICE

QUESTION: What notice is required to be given of a special primary election called by a county executive committee to provide a candidate for a county office, necessitated by a vacancy in nomination as contemplated by Section 102.48, Florida Statutes, 1941?

To Honorable Charles F. Slater, Democratic Executive Committee, Pasco County, Zephyrhills, Florida:

The statutes fix no particular period of time that notice must be given relative to such a special primary election.

The resolution of the county executive committee fixing the date for the special primary should provide for notice to be given in the manner to be set forth in such resolution.

Such special primary election should be conducted in pursuance of the laws governing the holding of general primaries as closely as such laws may be applicable.

In fixing the date for such special primary, regard should be had for the provisions of Section 99.10, Florida Statutes, 1941, which require that the names of all candidates to be printed on the general election ballot should be certified to the board of county commissioners not less than twenty days prior to the day of the general election. The general election is on November 5, 1946, and not less than twenty days prior thereto is October 16, 1946.

Attached hereto is a copy of an opinion of this office, dated September 4, 1946, directed to Honorable O. P. Johnson, county judge, Kissimmee, Florida, covering a situation similar to the one outlined by you.

September 13, 1946.—046-377.

SPECIAL ELECTION—COUNTY COMMISSIONER—NOMINATION

QUESTIONS: 1. What laws, rules or regulations govern a special primary election held to provide a candidate in the 1946 general election for an office vacated by death of the holder thereof, as contemplated by Section 102.48, Florida Statutes, 1941?

2. In a county which has a population in excess of 315,000, according to the 1945 state census, and in which a vacancy occurs in one of the county offices as result of death of the holder thereof on September 8, 1946, is it necessary that a political party hold special primary elections, as contemplated by Section 102.48, to provide a candidate to run for said office in the 1946 general elections?

3. Must a candidate for the office of county commissioner for District No. 3 in Dade county, reside in such district?

To Honorable Park H. Campbell, Hudson and Cason, Miami, Florida:

It appears from the correspondence received that this former member of the above board died on September 8, 1946. Article VIII, Section 11, Florida Constitution, contemplated that at the general election held in 1944 the members of said board should be elected for a four-year term. Hence, I assume that this deceased former member of said board was elected in 1944 to a four-year term, and that his death results in a "vacancy in office," as such quoted words are used in said Section 102.48.

You advised in your telephone conversation that if two primaries are necessary, the cost thereof would be approximately \$25,000. The expense of a special primary election held under said Section 102.48 must be paid "out of the treasury of the county." Section 102.08, Florida Statutes, 1941.

Under Section 99.10, Florida Statutes, 1941, the board of county commissioners is permitted to have printed on the general election ballot "only the names of candidates who have been put in nomination by primary election, or the appropriate executive committee," certified to and filed with them not more than sixty nor less than twenty days previous to the day of the general election. The twentieth day prior to the

1946 general election is October 16, 1946. Any plan for the holding of a special primary, as contemplated by said Section 102.48 would be required to make provision for the holding of a second primary, if necessary, "within ten days after" the first primary election. Thus, if the provisions of Section 102.48 are followed, there must be contemplated the possibility of holding elections prior to October 16, 1946, and the time required to hold the same.

On September 4, 1946, two opinions of this office dealt with the necessity of holding special primary elections under Section 102.48, one dealing with a "vacancy in nomination" and the other with a "vacancy in office." The time then permitted, and the fact that in both instances the counties involved were not among our top counties in population (one 10,502 and the other 13,729), rendered feasible and practical application of the provisions of said Section 102.48. However, in this instance the time permitted for such special primary is less by more than a week, and the county involved is the largest one in the state. It is pointed out that under Article VIII, Section 11, Florida Constitution, a candidate for the office of county commissioner in Dade county must be nominated by vote of the entire county.

In view of the foregoing, in my opinion the above questions are answered in their numbered order as follows:

1. The answer to the second question renders unnecessary an answer to this question.

2. In view of the size of Dade county, the fact that any special primary held under said Section 102.48 would be required to be conducted throughout the entire county, and the limited time available, in my opinion it would not be feasible or practical for political parties to attempt to call and hold special primaries to select a candidate for this county office involved. Hence, it would seem that since no feasible or practical method is otherwise available, a political party has the inherent power to nominate by its appropriate executive committee a candidate for this office, and who, under the provisions of said Section 99.10, may be certified to the board of county commissioners as such candidate within the time prescribed by said law.

3. It appears that under Article VIII, Section 11, Florida Constitution, a candidate for the office of county commissioner for District No. 3, Dade county, must reside in said district.

April 6, 1946.—046-130.

VETERAN—CHANGED PARTY AFFILIATION

QUESTION: May a registered voter, who is a returned veteran, have the supervisor of registration change his party affiliation after March 7, 1946, and prior to the 1946 primaries?

To Mrs. Easter L. Gates, Supervisor of Registration, Broward County, Ft. Lauderdale, Florida:

It is here assumed that no local, special or population acts are applicable to registration in Broward county, and that the general registration laws of the state as found in Chapter 102, Florida Statutes, 1941, are applicable to such county. This opinion is conditioned upon such assumption.

It is further assumed that this veteran returned to Broward county subsequent to March 7, 1946.

In election precincts lying in whole or in part in a city of more than twenty thousand, biennial registration is required, at which time opportunity is afforded a registrant to change his party affiliation. Section 102.12, Florida Statutes, 1941. In precincts not lying in whole or in part

in a city of more than twenty thousand, biennial registration is not provided; and in such precincts registrants may change their party affiliation by application in writing to the supervisor of registration at any time after the general primary following his registration and "at least sixty days before the date of any general primary." Section 102.11, Florida Statutes, 1941. It thus appears that in these last described precincts, March 8, 1946, was the last day (i. e., the sixtieth day before May 7, 1946) for a registrant to change his party affiliation for the 1946 primaries; and it seems we have no provision of law waiving such 60-day requirement in favor of returning servicemen.

In view of the foregoing, in my opinion the above question is answered as follows:

If this returned veteran is a registrant in a precinct where biennial registration is required, under said Section 102.12, at the time of such registration he is afforded opportunity to state his present party affiliation. If, however, the returned veteran is registered in a precinct **not** lying in whole or in part in a city of more than twenty thousand, March 8, 1946, was the last day until after the 1946 primaries for him to change his party affiliation.

February 23, 1946.—046-67.

DADE COUNTY—USE OF BOOTHS

QUESTION: May the supervisor of registration of Dade county, Florida, during the period March 1-April 6, 1946, provide for the registration of electors at booths or offices in various parts of Dade county, such registration to be in charge of deputies to be appointed by such supervisor?

To Honorable Carl Holmer, Jr., Supervisor of Registration, Dade County, Miami, Florida:

Chapter 22971, Laws of Florida, Acts of 1945, governs the registration of electors in Dade county.

Section 5 of said Chapter 22971, setting forth the powers and duties of the supervisor of registration, among other things, provides the following: "including the adoption and employment of methods of registration procedure not inconsistent with any of the provisions of this act." Section 5 of the Act provides, further, for the appointment of deputy supervisors of registration for each election precinct.

Section 11 of the Act provides for registration in election precincts during the month of February, 1946. Section 10 contemplates that subsequent to the month of February and until the registration files and records close at the beginning of the period of thirty days immediately preceding the first primary in May, 1946, registration shall be at the office of the supervisor of registration.

In my opinion, the above question properly is answered as follows:

Grave doubt exists that the power of the supervisor of registration to adopt and employ methods of registration procedure not inconsistent with the provisions of said Chapter 22971, would include the power to put into operation the plan reflected in the above question. In the absence of a judicial construction of the matter by a court of final jurisdiction, ordinary caution dictates that the plan not be put into operation. Hence, the question is answered in the negative.

September 4, 1946.—046-374.

SPECIAL PRIMARY—COUNTY JUDGE

QUESTION: In May 1946, O. P. Johnson was appointed to fill the unexpired term of J. F. Robinson, as county judge, the said J. F. Robinson having died. Johnson received the appointment for a term ending the first Monday after the first Tuesday in January, 1947. What action may be taken to have his name printed on the ballot for the general election as a candidate for the office of county judge for Osceola county, Florida?

To Honorable O. P. Johnson, County Judge, Osceola County, Kissimmee, Florida:

Section 102.48, Florida Statutes, 1941, says:

"... if for any cause there is a vacancy in any nomination or in any office and no method is otherwise provided herein for filling such vacancy in nomination, then and in that event ... the county executive committee in the case of a vacancy in a county office, shall call a primary election to provide for a nominee for such office and in case no candidate receives a majority of the votes cast in the primary so called and held, a second primary election shall be held within ten days thereafter."

Thus, it is the duty of the county executive committee to call a special primary election to obtain a candidate for this office. The statutes fix no particular period of time for notice thereof. Since the time for county candidates to qualify in the regular primaries under Section 102.33, Florida Statutes, 1941, is not less than 45 days prior to the day of the primary election, obviously there is not sufficient time here to impose the requirements of such particular provision. It should be noted, however, that the said special primary election should in all respects be conducted as far as possible according to the applicable provisions of the law of Florida respecting the conduct of regular primary elections. It is further called to your attention that under the provisions of Section 99.10, Florida Statutes, 1941, candidates' names must be certified to the board of county commissioners not less than twenty days previous to the day of the general election. Therefore, in fixing the date for this primary, regard should be had to this requirement of law, and also to the fact it may be necessary to conduct a second primary. Not less than twenty days prior to the general election this year is October 16th. Thus, it would seem that the committee should adopt a resolution fixing the date of the special primary election and also the date for a second primary in the event such is necessary, and providing that such notice be given of the election as shall be fixed by the committee in said resolution, and said resolution should further set forth the rules and regulations governing the time for candidates to qualify for said election.

It would seem further that the expense of holding such special primary election or elections shall be paid by the county, and that in the conduct of such election all things required by the general primary laws to be done by the county commissioners with respect to the appointment of inspectors and clerks and the preparation of the ballot boxes shall be performed by them with respect to such special primary election.

May 9, 1946.—046-192.

INTOXICATING LIQUORS—ELECTIONS—CLOSING OF BARS

QUESTION: Does Florida have any law requiring barrooms and saloons to close up on the day of any general, special or primary election?

To Honorable J. M. Hearn, County Judge, Suwannee County, Live Oak, Florida:

Such a law was passed in 1895, Chapter 4328, Section 59, and was brought forward in the 1906 General Statutes as Section 3813. This section was omitted from the Revised General Statutes of 1920. Article 19, Section 2 of the Constitution of the State of Florida, provided that all laws relating to intoxicating liquors, wines and beer, which were in effect on December 31, 1918, should become effective and, therefore, said Section 3813, although omitted from the Revised General Statutes of 1920, by virtue of this constitutional amendment became effective upon the adoption of said Article 19, Section 2; however, Section 19, Chapter 16774, Laws of 1935, expressly repealed the said Section 3813, General Statutes of 1906, and we, therefore, at the present time have no statute requiring barrooms and saloons to close up on the day of any general, special or primary election.

Many of our cities though have adopted ordinances which do close such places of business within their corporate limits on these election days.

April 30, 1946.—046-179.

POLLS—OPENING AND CLOSING—TIME

QUESTION: Should United States standard time be observed in the 1946 primaries in the opening and closing of the polls, bearing in mind that some cities of Florida may adopt daylight saving time prior to the date of the first primary?

To Honorable R. A. Gray, Secretary of State:

Section 99.07, 1945 Supplement to Florida Statutes, 1941, governs the time for opening and closing of the polls at the 1946 primary election. Section 102.55, Florida Statutes, 1941.

Said Section 99.07 provides that the polls shall be opened at 7 o'clock a. m. on election day and shall be kept open until 7 o'clock p. m. of the same day, "the time to be observed for such opening and closing of the polls to be regulated by the customary time in standard use in such locality."

Since the enactment of Chapter 4328, Laws of Florida, Acts of 1895, the laws with respect to the opening and closing of the polls have been changed twice, viz., by Chapter 20409, Laws of Florida, Acts of 1941 (Section 99.07, Florida Statutes, 1941), and by Chapter 22739, Laws of Florida, Acts of 1945 (now Section 99.07, 1945 Supplement to Florida Statutes, 1941). It is to be particularly noted that in each of these three laws, after setting forth the time for opening and closing of the poles, the following identical wording is found: "the time to be observed for such opening and closing of the polls to be regulated by the customary time in standard use in such locality."

Unless in this quoted wording there is found an exception to the provisions of Section 1.02, Florida Statutes, 1941, relating to "legal time," by the provisions of such section, "the time to be observed" for the opening and closing of the polls will be the United States standard time.

It is not considered it was the legislative intent that "the time to be observed" with respect to opening and closing of the polls, as provided in Section 99.07, 1945 Supplement to Florida Statutes, 1941, should be taken and construed as an exception to the provisions of said Section 1.02. The use of the word "standard" in the wording "time in standard use in such locality," would seem to indicate that such word is not there used as an adjective in a general sense denoting an accepted rule, but that it was and is used in a special sense in relation to standard time.

In view of the foregoing, in my opinion the above question properly is answered as follows:

Polls should be opened at 7 o'clock a. m. and closed at 7 o'clock p. m. on primary election day, according to United States standard time, that is to say, according to eastern standard time in that part of Florida where such is the official time under said Section 1.02, and central standard time in that part of Florida where such is the official time under said Section 1.02. It would seem to be the better reasoning that daylight savings time unrelated to any state or national law, directive or order, is not "customary time in standard use" in those localities in Florida where it may be voluntarily adopted, as such quoted words are employed in said amended Section 99.07.

March 30, 1946.—046-121.

SCHOOL BOND ELECTIONS—FREEHOLDERS—REGISTRATION

QUESTION: A school bond election is proposed to be held in Special Tax School District No. 1 of Leon county, Florida, on or about April 30, 1946. Is it proper for the supervisor of registration of said county to keep the general registration books of said county open to permit freeholders who are qualified electors in said district to register for said election, closing said books "not later than five days before the date of said election," as contemplated in and provided by Section 103.05, Florida Statutes, 1941, in view of the provision of Chapter 22939, Acts of 1945, which, in effect, requires the "county registration books" of said county to be closed from and after April 1, 1946, until twelve days after the second primary election held in 1946?

To Miss Hattie L. Coles, Supervisor of Registration, Leon County, Tallahassee, Florida:

It would seem that the case of State vs. Special Tax School District No. 6 in Polk County, Florida, et al. (Fla.), 8 So. 2d. 658, provides an answer to the question here presented. From said case it appears that Chapter 20641, Laws of Florida, Acts of 1941, applicable only to Polk county, required that the registration books in the office of supervisor of registration "shall be closed twenty days prior to any special election." The court in considering the effect of the registration provision of Section 5, Chapter 14715, Laws of Florida, Acts of 1931 (now Section 103.05, Florida Statutes, 1941), and the provisions of said Chapter 20641, stated:

"It is clear that there is a separate and distinct field of operation of the respective acts and it was the duty of the supervisor of registration of Polk county to register freeholders up to five days prior to March 10, 1942, when the election was held in Special Tax School District No. 6 of Polk county. See State v. Town of Riviera, 143 Fla. 705, 197 So. 525."

It will be noted that the limited nature of this question presents no necessity here to inquire into the question of, or to identify, the laws of Florida applicable to the registration of electors in Leon county, other than to consider the effects of above Chapter 22939 and said Section 103.05.

In view of the foregoing, in my opinion the above question properly is answered as follows:

That the registration books of Leon county, Florida, in which electors properly may be registered for the general election, are required by said Section 103.05 to be kept open by the supervisor of registration of Leon county, Florida, for the purpose of permitting freeholders who are qualified electors residing in said district to register for said election, such books to close not later than "five days before the date of holding said district bond election." Provided, however, that such registrations so permitted and made subsequent to April 1, 1946, and prior to the date

such books shall close for said district bond election as required by said Section 103.05, shall be so made and entered in said books separate and distinct from other registrations therein and clearly indicating that such registrations are for the purpose of the registrants voting in the aforesaid district bond election only; and that any receipt, certificate or other written evidence which may be issued in connection with such a registration shall clearly indicate that such registration is for the purpose of permitting the registrant to vote in said district bond election only.

February 9, 1945.—045-28.

REREGISTRATION OF VOTERS

QUESTION: When should the supervisor of registration of Polk county, Florida, open the registration books of said county for the registration and reregistration of voters of said county whose registrations, pursuant to Chapter 20797, Acts of 1941, become null and void and of no effect on and after January 1, 1946?

To Honorable Hugh E. Carlton, Supervisor of Registration, Polk County, Bartow, Florida:

Section 1 of Chapter 20797, in effect, among other things, provided for the registration and reregistration of all voters who intended to qualify for voting in any general, primary or special election to be held in 1942, and for the reregistration of voters at four-year intervals thereafter; and in order to accomplish such purpose it was made the duty of the supervisor of registration of said county to immediately open the registration books of said county for the purpose of registering or reregistering voters. The act became a law on June 11, 1941.

Section 2 of said act provides that all registration of voters theretofore had in Polk county should be null and void and of no force and effect on and after January 1, 1942.

Section 5 of the act provides that all registration of voters thereafter had in Polk county under the provisions of the act should be null and void and of no force and effect on and after January 1, 1946, and every four years thereafter, it being the declared intent and purpose of the act that in said county there shall be a complete reregistration of voters each and every four years.

Section 4 of the act provides that the supervisor of registration shall keep the registration books of the county open for registration and reregistration of voters of said county as provided for in said act "at the times and places as are now provided for in said county for the registration of voters."

A brief review of legislation relative to registration in Polk county is required.

Chapter 10234, Acts of 1925, provided, among other things, that in all counties having a population of not less than 50,000 and not more than 65,000 according to the last census of 1925, the registration books should be kept open every weekday, should close before general, primary and special elections at the time provided by law, and should "re-open for registration purposes the day following said election or elections." Polk county was included in this population bracket.

Chapter 17399, Acts of 1935, applicable to counties then or thereafter having a population of more than 70,000 and not more than 140,000 "according to the last preceding state or federal census," provided, among other things, for the purpose of this letter, the same as said Chapter 10234 with respect to the keeping of the registration books open, closing of same before and during general, primary and special elections, and reopening of same on the day following such election or elections. Polk county was included in this population bracket, and the 1935 Senate Journal evidences that the bill was introduced by the Polk county senator.

Chapter 18293, Acts of 1937, applicable to counties then or thereafter having a population of more than 75,000 and not more than 140,000 "according to the last preceding state or federal census," for the purpose of this letter is a restatement of Chapter 17399 except that with respect to the reopening of the registration books after an election or elections the act provides "that the registration books of said county shall re-open for registration purposes at the time or in the manner now or hereafter required by law." Polk county was included in this population bracket.

Attention is further directed to the fact that Chapter 19663, Acts of 1939, amended Sections 363 and 369, Compiled General Laws, 1927, with respect to the times when the primary registration books should be kept open, and such chapter repealed all laws and parts of laws in conflict therewith.

It is assumed that the above quoted portion of Section 4 of Chapter 20797 with respect to keeping the registration books of the county open, viz., "at the times and places as are now provided for in said county for the registration of voters," means the times and places provided by law at and immediately preceding the date such chapter became effective. What did the law then provide with respect to this question? The answer to the question requires consideration and determination of several legal problems: Whether Chapters 10234, 17399, and 18293 are local or general laws; which, if any, of these laws was a constitutional enactment; which if any of these laws was in force on June 11, 1941; whether Chapter 19663 or Chapter 20719, Acts of 1941 (approving and adopting Florida Statutes, 1941), bears upon the subject; and whether a reasonable construction of Chapter 20797 itself does not contemplate that the registration books shall close only prior to elections as fixed by the general law and during such elections.

If you were required to perform any duty at this time, I would not hesitate to give you an opinion on the question presented even though I realize the uncertainties which would still exist in the absence of a determination by the courts of the problems presented. Since it appears, however, that time permits it, I suggest that at the coming session of the legislature the uncertainty with respect to the question involved, presented by Chapter 20797, be clarified by an appropriate act, after due notice as required relative to special or local legislation.

February 21, 1946.—046-76.

REGISTRATION—ELIGIBILITY—EXPENSES

QUESTIONS: 1. Is a supervisor of registration authorized to register a person who cannot sign the registration books by reason of illiteracy?

2. Can a deputy registration officer assist a district registration officer in precinct registrations?

3. Can a precinct registration officer be appointed to register electors outside the precinct in which he is registered?

4. Is the wife of a registered voter of Florida eligible to register if she has not had actual residence in the state one year but has been married two years?

5. Under the provisions of Section 2, Chapter 22627, Laws of Florida, Acts of 1945, (a) is a candidate for party nomination required to file further expense statements after his automatic nomination by reason of having no opponent; and (b) does the wording of said provision of law include candidates for election as party committeemen and committee-women?

To Mrs. Easter L. Gates, Supervisor of Registration, Fort Lauderdale, Florida:

It is assumed that the general laws of Florida related to registration of electors in primary and general elections obtain in Broward county; and this opinion is conditioned upon such assumption.

In my opinion, the above questions are properly answered in their numbered order as follows:

1. An illiterate person, otherwise qualified, is entitled to registration. In addition to signing the registration book, an applicant for registration is also required to "take and subscribe" to the oath required by Section 3, Article VI, Florida Constitution. (See also Sections 98.11 and 102.19, Florida Statutes, 1941). The law relating to registration for primary elections sets forth the procedure with respect to illiterates. Section 102.21 (12), Florida Statutes, 1941. The laws relating to registration for the general election do not mention illiterates. However, it is pointed out that our constitutional provisions relating to the qualification and registration of electors do not deny the franchise to a person because of illiteracy. (See Sections 1, 2, 3 and 4, Article VI, Florida Constitution). Furthermore, the word "subscribe" as used in Section 3 of said Article VI, by the better general rule would seem to include the signature of a deponent by his mark, duly witnessed. Words and Phrases, Volume 40, page 455.

2. Section 102.20, Florida Statutes, 1941, provides for the appointment of deputy supervisors of registration by a supervisor of registration, and prescribes that such deputies shall have all the powers of the supervisor. The appointment of district registration officers is provided for by Section 98.15 (part of the general election laws) and 102.09 (part of the primary election laws). Florida Statutes, 1941. It would seem that any act which a district registration officer could legally perform in the registration of electors in his district, could be performed by the supervisor of registration assisting him; hence, it would appear that a deputy supervisor could assist a district registration officer.

3. It is assumed that this question contemplates that the district registration officer lives in the district where he is registered. While the statutes relating to the appointment of district registration officers are silent upon the point, it is reasonably assumed that he shall be registered in and be a resident of the district for which he is appointed. It would, therefore, appear doubtful that a district registration officer properly could register electors outside his own district.

4. It is assumed that the facts reflected by this question are as follows: This man and woman married two years ago. Less than one year ago the wife for the first time came to and began to reside in the domicile established by her husband in Florida. The separation of the husband and wife between the time they were married and the date the wife came to Florida was amicable in nature and temporary. The husband is a qualified elector of Florida.

Section 98.01, Florida Statutes, 1941, (see also Article VI, Section 1, Florida Constitution), provides that every person twenty-one years and upwards, who shall at the time of residence be a citizen of the United States "and shall have resided and have had his habitation, domicile, home, and place of permanent abode in Florida for one year, and in the county for six months, shall, if otherwise qualified according to law in such county be deemed a qualified elector at all elections under the constitution."

A person registering either as an elector for the general election or the primary election is required to subscribe to the oath prescribed by Article VI, Section 3, Florida Constitution (see Sections 98.11 and 102.19, Florida Statutes, 1941). The effect of such oath is that the deponent asserts possession of those qualifications prescribed by Section 1 of said Article VI.

It is recognized that, except in certain instances not covered by the factual situation here assumed, this wife cannot establish a domicile separate from that established by her husband. *Minick vs. Minick* (Fla.) 149 So. 483. It is further recognized as the general rule, that the legal residence for voting purposes of a married woman not permanently separated from her husband is that of the husband. 29 C. J. S. 42. While it is true that each of the words "resided," "habitation," "domicile," "home" and "place of permanent abode," as employed in said Section 98.01 and Article VI, Section 1, Florida Constitution, could be construed as meaning the same thing; however, it is assumed that the framers of our constitution were not just using words of synonymous import. It would seem that the purpose for their use was to require an actual, physical presence in Florida as a part of the intent to establish residence in Florida. A wife who has never been to Florida may have her domicile selected for her in this state by her husband; but it would reasonably appear that until she came to Florida it could not be said that she "resided" or had her "abode" in Florida, within the meaning of said Section 98.01. *Dorsey vs. Brigham* (Ill.) 42 R. A. 809; *Park vs. Hood* (Ill.) 27 N. E. 2d. 838.

Since it appears that this wife came to Florida for the first time less than one year ago, it would seem to be reasonable that she is not eligible for registration, and will not be until she shall have resided in this state for at least one year.

5. Section 2 of Chapter 22627, Laws of Florida, Acts of 1945, provides that "any candidate for party nomination in any state or county primary election who is automatically nominated by reason of having no opponent to qualify, shall not be required to file any further campaign expense statements after automatic nomination in such primaries." The clear wording of this law would seem to dispose of the question in so far as candidates for nomination are concerned. However, whether such law includes candidates for election in the primary as committeemen and committeewomen presents a question of some difficulty.

Our supreme court in the case of *State vs. Carson* (Fla.) 154 So. 150, indicated that candidates for election to party executive committees in the primary were required to file the expense statements required by Section 102.57, Florida Statutes, 1941. The statement of the court is none too clear and is dictum, but it would seem to announce a rule which should not be ignored. There is no indication as to how the court arrived at this conclusion; but it would seem that if the wording "each and every candidate for nomination," as used in said Section 102.57, is to be construed to include candidates for election in the primary to executive committees, then the wording "any candidate for party nomination," as used in said Chapter 22627, should be construed to include such candidates for election in the primary.

Therefore, it appears that the provisions of said Chapter 22627 apply with equal effect to unopposed candidates for nomination for public office and candidates for election to party office.

October 26, 1945.—045-334.

NEGRO—REGISTRATION AS DEMOCRAT

QUESTION: Should a county registration officer comply with the application of a negro, who is otherwise a qualified elector under the laws of Florida, for registration as a democrat in the primary registration books of the county?

To Honorable R. A. Gray, Secretary of State:

You are referred to two recent cases of our supreme court: *Davis vs. State ex rel. Cromwell*, 23 So. 2d. 85, and *Davis vs. State ex rel. Chavis*, 23 So. 2d. 87. *Cromwell* and *Chavis* are negroes, residents of Escambia county. Upon refusal of the supervisor of registration of Escambia county,

to comply with the request of such negroes that they be registered in the primary election books of such county as democrats, these negroes instituted action in mandamus to require said officer to so register them. This office participated in the defense of said county official in these suits. Upon final hearing the trial court issued peremptory writ of mandamus which, in effect, directed that said supervisor of registration so register such negroes. The cases were appealed to our supreme court, and we participated in such cases on appeal.

Directly involved in both of these cases was the question set forth above, along with certain procedural questions of no moment here. It was our contention in the trial court and in briefs filed and argument made in such cases in the supreme court that the registration officer of Escambia county was not required to register these two negroes in the primary registration books as democrats. The question presenting this issue to the court, set forth in appellant's briefs in both of such cases, is quoted by the court in the Cromwell case, and that part of the decision in the Cromwell case, together with the court's answer to such question, is set forth as follows:

"The controlling question which is sought to be adjudicated here is stated by the appellant as follows:

" 'Question No. 11.

" 'Where a negro person of African descent, who is otherwise a qualified elector under the laws of Florida, desires to be registered as such elector affiliated with the Democratic Party, appears at the office of the Supervisor of Registration in Escambia County, Florida, and offers to comply with all of the requirements of Section 102.21, Florida Statutes Annotated, and requests that he be registered as such an elector on the registration books of such county, and the State Democratic Executive Committee of Florida has resolved that the terms and conditions of which legal electors shall be declared and taken as proper members of the Democratic Party of Florida shall be 'White Persons,' is such a negro person entitled to be registered as a Democratic Elector on such books provided such books are open for such purpose under the law?'

"We think this question is put at rest adversely to the contention of the appellant by the opinion and judgment of the Supreme Court of the United States in the case of *Smith v. Allwright, Election Judge, et al.*, 321 U. S. 649, 64 S. Ct. 757, 759, 88 L. Ed. 1594, 151 A.L.R. 1110."

In both the Cromwell and the Chavis cases the Supreme Court of Florida affirmed the circuit court of Escambia county. Thus, the above contention so made by us with respect to the right of such supervisor of registration to refuse to register these negroes, as aforesaid, was unsuccessful. It is observed that in view of the holding of the Supreme Court of the United States in the case of *Smith vs. Allwright*, supra, our supreme court was permitted little, if any, latitude in its choice of an answer to the above quoted question.

In view of the foregoing, it appears the above question properly is answered as follows:

The registration officer of Highlands county should be guided with respect to the application of negroes to be registered in the primary registration books as democrats by the decisions of the Supreme Court of Florida in the above noted Cromwell and Chavis cases, which is that they are entitled under the law to register as members of the party of their choice, and having so done, to vote in the primary of that party.

August 15, 1946.—046-355.

REGISTRATION—PRESENTATION OF BOOKS—
TRANSFER OF NAMES

QUESTIONS: 1. Is the supervisor of registration authorized to transfer to the general election registration books the names of those electors duly registered in the primary registration books?

2. Where the county commissioners have divided one election district into two election districts, what procedure should be followed by the supervisor of registration in preparing the general registration books so that the voters who were duly registered in the old district prior to its division, will properly appear as duly registered electors in such new districts?

To Honorable W. F. Anderson, Attorney at Law, Bronson, Florida:

It is assumed that no special laws govern the registration of electors in Levy county, and that the general laws respecting registration apply in such county. This opinion is conditioned upon such assumption.

Section 102.10, Florida Statutes, 1941, provides that all persons who have heretofore registered or may hereafter register under the provisions of Chapter 102, Florida Statutes, 1941 (the chapter relating to primary elections), in precincts which are not located wholly or in part within a city of more than twenty thousand population "shall be deemed duly registered for all general primary elections and for all general and special elections so long as they continue to reside in the election precinct in which they so registered and their names shall be carried upon the registration books as electors duly registered for such elections." Said Section 102.10 would seem applicable to Levy county. While an elector properly may register in both the primary and general election registration books, it would appear that by virtue of the above provision of law, registration in the primary books is sufficient, and that the names of such registrants should "be transferred to the general election register by the supervisor without any further act on the part of the registrant..." State ex rel Gandy vs. Page, Judge et al. (Fla.), 170 So. 118, 119. The court in said case was using such quoted words with respect to certain provisions of Section 102.12, Florida Statutes, 1941, but they appear equally applicable to this phase of said Section 102.11.

Section 98.23, Florida Statutes, 1941, provides, in part, that the board of county commissioners in each county may at any time prior to the first day of July in any year in which there shall be a general election, alter or change election districts or create new ones, in the manner and as provided by Sections 98.23-98.26, Florida Statutes, 1941.

It is well known, of course, that among the qualifications prescribed for an elector is the qualification that he must be registered (Article VI, Section 1, Florida Constitution; Section 98.01, Florida Statutes, 1941); that the legislature was required to provide by law for the registration of the electors in the several counties of the state (Article VI, Section 2, Florida Constitution); and that the elector shall vote in the district where he is registered (Section 98.32, Florida Statutes, 1941).

It would seem that where persons are duly registered electors in a district at and prior to the time it is divided by a board of county commissioners, and as result of such division find themselves residing in a differently numbered district, such division should not require a new registration by them in the newly created district.

In view of the foregoing, in my opinion the above questions properly are answered in their numbered order as follows:

(1) This question is answered in the affirmative; that is to say, that under the provisions of Section 102.11, Florida Statutes, 1941, the supervisor of registration of Levy county is authorized to transfer to the general election registration books the names of those electors duly registered as provided in Chapter 102, Florida Statutes, 1941.

(2) In preparing the general election registration books for the coming general election, the supervisor of registration should, in the preparation of books for two districts created from a single district, transfer to such books the names of those qualified electors who were duly registered in the old district, according to the respective places of residence of said electors in such two new districts.

March 27, 1946.—046-140.

REGISTRATION—ELIGIBILITY—AFFILIATION

QUESTION: In a certain Florida precinct 316 negroes are registered in the primary registration books, such books not evidencing the party affiliations of such registrants. May such registrants vote in the May, 1946, primary?

To Honorable J. B. Mashburn, Supervisor of Registration, Bay County, Panama City, Florida:

It is assumed that the registration books referred to in your letter are those for use in the primary election. You will note that the above question is conditioned upon such assumption.

You state you understand these registrants did not know or would not state their party affiliations.

Under Section 102.21, Florida Statutes, 1941, as part of the information required to be entered on the registration books, is the party affiliation of the registrant.

Under Section 102.40, Florida Statutes, 1941, it is provided that any qualified elector who is also a member of a political party, as defined under our primary election law, "shall be entitled to vote at such primary election and shall receive the official primary election ballot of the political party designated in his registration, and no other." Where voting machines are used at a primary election as authorized in and provided by Chapter 100, Florida Statutes, 1941, the procedure with respect to ballots is, of course, different from that set forth in said Section 102.40 where such machines are not used. However, whether voting machines are used or not, since it is apparent that only a person who is the member of a party having candidates participating in the primary is authorized to vote at such primary, it would seem that the registration books should evidence his party affiliation.

In view of the foregoing, in my opinion the above question is properly answered as follows:

Since it appears that the party affiliations of the three hundred sixteen negroes do not appear to be entered in the registration books in the precinct involved in the above question, such registrants are not entitled to vote in the 1946 primary election.

May 22, 1946.—046-217.

STATE CANDIDATES—EXPENSES

QUESTION: In the second primary election of 1946 to be held in your county only two names will appear on your ticket and these are state candidates for a member of the supreme court and the railroad commission. Because only state candidates are to be nominated in this primary, are the expenses of such primary election to be borne by the State of Florida or your county?

To Honorable T. J. Jennings, Jr., County Judge, Clay County, Green Cove Springs, Florida:

You cite Section 102.08, Florida Statutes, 1941, as authority for your thinking that perhaps expenses should be borne by the state alone. Section 102.08, Florida Statutes, 1941, reads as follows:

"The expenses of holding the primary election herein provided for, including the expenses of preparing all ballots, blanks and other supplies to be used at any primary election, and all expenses necessarily incurred in the preparation for or the conduct of such primary election, shall be paid out of the treasury of the county or the state, as the case may be, in the same manner, with like effect, and by the same officers as in the case of general elections."

Inasmuch as said Section 102.08, Florida Statutes, 1941, says that the expenses of primary elections shall be paid out of the treasury "in the same manner with like effect and by the same officers as in the case of general elections" it will be necessary to read this section in connection with other sections of the law pertaining to general and primary elections.

Section 99.04, Florida Statutes, 1941, says:

"Inspectors and clerks of any special or general election of any county and the deputy sheriff serving at the respective polling places in the various election districts shall be paid for their services by their respective boards of county commissioners . . ."

Section 102.51, Florida Statutes, 1941, says that the secretary of state shall certify to the board of county commissioners the names of the nominee or nominees of state offices which names "shall be printed by the Board of County Commissioners upon the ballot."

In reading and construing these three sections together, as must be done, the expenses of holding the second primary election should not be at the expense of the state alone.

April 15, 1946.—046-148.

COMMITTEEMEN—EXPENSE STATEMENTS

QUESTION: Should a candidate for election in the 1946 primary as a party committeeman be deprived of the right to have his name printed on the primary election ballot for failure of such candidate to file an expense statement under the provisions of Section 102.57, Florida Statutes, 1941?

To Honorable R. A. Gray, Secretary of State:

Party committeemen and committeewomen are elected at the primary election. Section 102.07, Florida Statutes, 1941.

Section 102.57 requires "every candidate for nomination in a second primary election" to file the expense statements required by said section.

Section 102.64, Florida Statutes, 1941, provides that "any candidate who fails to make and file" the expense statements required by Section 102.57, shall not have his name printed on the ballot to be used in the primary.

On February 21, 1946, this office rendered an opinion that county committeemen were required to file the expense statements required by said Section 102.57. This ruling was based solely upon the following quoted part of *State vs. Carson* (Fla.), 154 So. 150:

"The provision of the statute forbidding commissions or certificates of election or of nomination to be given to those candidates who failed to file their expense statements refers to nominations in the primary elections as to the election of party executive committees, delegates to national conventions, etc., in primary elections. The statute does not provide that the failure to file the required financial statements of expenses incurred in primary elections renders the person so failing ineligible to election or to fill the office if elected, though it does make a willful violation of section 421 a criminal offense."

It will be noted that such quoted part of said case is dictum and not at all clear, but because of it, ordinary caution suggested we then assume the position found in such opinion of February 21, 1946.

The time is now past for the filing of the first expense statement; and the question now presented is whether or not a candidate for election to a party office in the 1946 primary, for failure to file such statement be deprived of the right to have his name printed on the election ballot under said Section 102.64.

Prior to the above Carson case, former Attorneys General Davis and Landis, held that committee members were not required to file such expense statements (see Biennial Reports of Attorney General, 1931-32, page 559, and 1935-36, page 374). The position assumed by such officials obviously was sound. Our supreme court has never ruled squarely upon the question. Regardless of the above quoted part of the Carson case, such strong reason exists contrariwise as to raise reasonable doubt that the provisions of said Section 102.57 are applicable to candidates for election as party committeemen and committeewomen.

In view of the foregoing, in my opinion the above question properly is answered as follows:

A candidate for party committeeman who failed to file an expense statement required of candidates for nomination by said Section 102.57, should not be deprived of the right of having his name printed on the primary ballot in consequence of such failure.

February 21, 1946.—046-77.

COUNTY COMMITTEE—EXPENSE STATEMENTS

QUESTION: Is it required of county committeemen to file expense accounts as provided in Section 102.57, Florida Statutes, 1941?

To Mr. Walter Page, Wakulla, Florida:

A county committeeman is elected in primary elections (Section 102.07, Florida Statutes, 1941). Section 102.57 refers to candidates for nomination in primary elections.

Honorable Fred H. Davis and Honorable Cary D. Landis, former attorneys general, both held that candidates who were to be nominated were required to file campaign statements but county committeemen, being elected and not nominated, are not required to file such expense statements.

On April 15, 1940 Honorable George Couper Gibbs, former attorney general held to the contrary and said that county committeemen were required to file such expense statements and based his opinion on the language of the court as found in *State ex rel Landis vs. Carson*, 154 So. 150, reading as follows:

"The provision of the statute forbidding commissions or certificates of election or of nomination to be given to those candidates who failed to file their expense statements refers to nominations in the primary elections as to the election of party executive committees, delegates to national conventions, etc., in primary elections."

It is true as stated by Attorney General Gibbs in this opinion that the language used in the said case was dictum but the opinion was concurred in by all members of the court.

Inasmuch too as Section 102.62, Florida Statutes, 1941, says that the total expenditures allowed and authorized for the purposes specified in Section 102.61 shall not be in excess of one hundred dollars for members of the county executive committee of any political party leads me to believe that the opinion by Attorney General Gibbs is the better one.

It is my opinion, therefore, that county committeemen should be required to file their expense statements.

Chapter 22627, Laws of Florida, 1945, Section 2, says:

"Any candidate for party nomination in any state or county primary election who is automatically nominated by reason of having no opponent to qualify shall not be required to file any further campaign expense statements after automatic nomination in such primary."

In view of the construction placed by me on Section 102.57, as above set forth, it is my opinion that a county committeeman, who is automatically nominated by reason of having no opponent to qualify, should not be required to file any further campaign expense statement after automatic nomination in such primary.

April 15, 1946.—046-147.

COMMITTEEMEN—FILING

QUESTIONS: 1. Is a candidate for member of the State Democratic Executive Committee who filed with you the oath as required as a candidate and in time, but did not file with you a receipt from the democratic executive committee qualified to have his name printed on the ballot?

2. Is such a candidate who did not file with you on or before April 12, 1946, a statement of campaign expenses qualified to have his name printed on the ballot?

To Honorable James E. Connor, Clerk of the Circuit Court, Inverness, Florida:

Answering your first question, I would say that Sections 102.27 and 102.31, Florida Statutes, 1941, which are to be read together, require only filing fees to be paid by candidates for any office which pays a salary or compensation. Inasmuch as the State Democratic Executive Committeemen are paid no salary they would file no fee and would have no receipt to be filed with you.

Answering your second question, I herein hand you an opinion prepared today addressed to Honorable R. A. Gray, Secretary of State, in which I held that failure to file such expense statement should not deny a candidate for State Democratic Executive Committee the right to have his name printed on the ballot.

March 15, 1946.—046-101.

EXPENSE STATEMENTS—DATES FOR FILING

QUESTIONS: 1. Since May 7, 1946, is the date of the first primary this year, what period is contemplated this year (exact calendar dates) by the wording, "not more than thirty days nor less than twenty-five days prior to the first primary election," as used in Section 102.57, Florida Statutes, 1941, with respect to the filing of expense statements by candidates?

2. What period is contemplated this year (exact calendar days) by the wording, "not more than twelve nor less than eight days prior to the first primary election," as used in said Section 102.57, with respect to the filing of expense statements by candidates?

To Honorable R. A. Gray, Secretary of State:

The pertinent wording of said Section 102.57, Florida Statutes, 1941, is as follows:

The first expense statement shall be filed "not more than thirty nor less than twenty-five days prior to the first primary election."

The second expense statement shall be filed "not more than twelve nor less than eight days prior to the first primary election."

The case of *State ex rel. Ashton vs. Harris, et al.*, 115 Fla. 3, 155 So. 100, would seem to furnish the rule for computing this time. At the time the case was decided, the primaries were held on the first and fourth Tuesdays after the first Monday in June (Sections 359 and 411, C.G.L., 1927). Section 102.57, Florida Statutes, 1941, is the same now as it was when such case was decided. This case evidences that June 5, 1934, was a primary election day (the first primary); that May 11, 1934, "was the last possible day" the first expense statement "could be legally filed" under the law. Thus, it appears that the court in this cause determined that the twenty-fifth day prior to the date of the primary election was ascertained by **excluding** the first day and **including** the last day of the period in the count.

While the computation of time in this instance does not result in either of the periods terminating on Sunday, yet Sundays are involved in both these periods of time. It is recognized that under certain circumstances if an act is required to be done within less than a week Sundays are excluded in the count. (See *Smithie vs. State*, 88 Fla. 70, 101 So. 276; *F. E. C. Ry. Co. vs. George*, 91 Fla. 42, 107 So. 266; *Burnet vs. State*, 145 Fla. 220, 198 So. 827; *Chitty & Co. vs. Granthum*, 145 Fla. 299, 200 So. 696, and 146 Fla. 756, 1 So. 2d. 725). However, it is felt that there is no application of such rule to the periods here dealt with; and certainly in the absence of court construction ordinary caution precludes any indulgence in such theory.

In view of the foregoing, in my opinion the above questions properly are answered as follows:

(1) As used in Section 102.57, "not more than thirty days nor less than twenty-five days prior to" May 7, 1946, is the period April 7th to 12th, 1946, both dates inclusive.

(2) As used in Section 102.57, "not more than twelve nor less than eight days prior to" May 7, 1946, is the period April 25th to 29th, 1946, both dates inclusive.

February 11, 1946.—046-57.

CANDIDATE—REFUND OF FEE

QUESTION: Will I, as clerk of the circuit court, be permitted to refund money paid in by candidates for their qualifying fees if they come in after the dead line for qualifying has passed and ask to withdraw from the race and ask for a return of their money?

To Honorable Sidney C. Edwards, Clerk of Circuit Court, Lafayette County, Mayo, Florida:

In May, 1930, the Honorable Fred H. Davis, then attorney general and afterwards a member of the supreme court, rendered the following opinion:

"It seems to me that a candidate can be reimbursed the amount of his filing fee if he withdraws from the race at any time before the final day for qualification has expired. The last day for a county candidate to qualify was May 8th, and if the candidate you refer to indicated to you on or prior to May 8th that he wished to withdraw from the race, you would be authorized to refund him his money, otherwise not."

This has been concurred in by several of my predecessors in office.

On April 8, 1944, I rendered an opinion to the effect that where a candidate for office because of physical disability withdraws from the race prior to the printing of the ballots, he would be entitled to a refund of the qualifying fee paid in by him.

I felt when I rendered this opinion that it would not be fair and right to keep the qualifying fee of a candidate who was forced to withdraw because of physical disability, a matter not within his power or control.

It is my opinion, therefore, that unless the candidate can show some physical disability, he would not be entitled to the return of his qualifying fee if he failed to withdraw from the race until after the dead line for qualifying had expired.

February 11, 1946.—046-41.

EXPENSE STATEMENT—UNOPPOSED CANDIDATE

QUESTION: "Do candidates unopposed for primary nomination have to file first, second and third expense statements and statement of political workers?"

To Honorable Ted Cabot, Clerk of the Circuit Court, Broward County, Ft. Lauderdale, Florida:

Sections 1 and 2 of Chapter 22627, Laws of Florida, 1945, say:

"Section 1. That all candidates for nomination of political parties under the primary laws of Florida who are required to file expense statements under the existing laws shall file such expense statements with the Secretary of State if the candidate's qualification oath was filed with that official, or shall file it with the clerk of the court if the qualification oath was filed with that official."

"Section 2. Any candidate for party nomination in any state or county primary election who is automatically nominated by reason of having no opponent to qualify shall not be required to file any further campaign expense statements after automatic nomination in such primary."

I think this law is clear, and will answer your question.

February 11, 1946.—046-54.

ELECTION STATEMENTS—TIME FOR FILING

QUESTION: When is the time within which candidates for the office of state senator and member of the house of representatives must qualify for the primary election?

To Honorable J. H. Little, Clerk of the Circuit Court and County Auditor, Holmes County, Bonifay, Florida:

Sections 102.69 and 102.70, Florida Statutes, 1941, require candidates for the office of state senator and member of the house of representatives to file their sworn statements and pay their filing fees not later than the first days of February prior to the first primary election.

Chapter 22760, Laws of Florida, 1945, says:

"Section 1. That candidates for nomination in primary elections in this state shall file their sworn statement as required by section 102.29, Florida Statutes, 1941, not later than twelve o'clock noon on the last day of the period within which such sworn statement may be filed."

Construing the above stated law, it is my opinion that candidates for the office of state senator and member of the house of representatives in the primary election of 1946 must file their sworn statements as required by Section 102.29, Florida Statutes, 1941, not later than twelve o'clock noon February 1, 1946.

March 11, 1946.—046-90.

UNEXPIRED TERM—SALARY—FILING FEE

QUESTIONS: (1) The superintendent of public instruction for St. Lucie county, elected for the four-year term beginning in January, 1945, died on or about June 1, 1945, and a successor was appointed by the governor on June 7, 1945, for the period beginning on such latter date and to the first Tuesday after the first Monday in January, 1947. Is the term of office to be filled at the general election in 1946 the remaining part of the unexpired term of said deceased superintendent of public instruction who took office in January, 1945, or a regular four-year term beginning in January, 1947?

(2) Up to July 1, 1945, the annual salary of such office was \$3300. Since July 1, 1945, the annual salary has been \$4200. Under Section 102.31, Florida Statutes, 1941, is the filing fee therein required computed on the 1945 or 1946 salary of the office?

To Honorable D. C. Huskey, Superintendent of Public Instruction, St. Lucie County, Fort Pierce, Florida:

An examination of the records of the office of the secretary of state evidences that the person elected to this office and who entered into office in January, 1945, and subsequently died, was elected for the regular four-year term; and that the governor appointed the incumbent to serve until the first Tuesday after the first Monday in January, 1947. It is further noted that the second question above assumes that beginning with July 1, 1945, the salary of this office has been and will continue to be until lawfully changed at the rate of \$4200 annually.

A county superintendent of public instruction is a constitutional officer. Section 6, Article VIII, Florida Constitution. Hence, it would appear that upon the death of a person elected to this office for a four-year term beginning in January, 1945, the governor properly filled the office by appointment of a successor to serve until the first Tuesday after the first Monday in January, 1947. Article XVIII, Section 6, Florida Constitution. It is further noted that Article XVIII, Section 7, Florida Constitution, provides that in cases of election to fill vacancies in office such election shall be for that part of the unexpired term commencing on the first Tuesday after the first Monday in January next after such election. In this connection, attention is also directed to an Advisory Opinion to Governor, 19 So. 2d. 198.

Section 102.31, Florida Statutes, 1941, provides a filing fee of "three per cent of the annual salary or compensation of the office sought by the candidate." If the salary of this office for the calendar year 1947 were different from the salary for 1946, a question might be presented; but it would seem that salary for the year 1945 is of no moment here.

In view of the foregoing, in my opinion the above questions properly are answered in their numbered order as follows:

(1) The person elected to this office at the 1946 general election shall be elected for that part of the unexpired term of the deceased officer who was elected and took office for the regular four-year term beginning in January, 1945.

(2) In this case, it would appear that the filing fee required by Section 102.31, Florida Statutes, 1941, properly should be computed on the 1946 salary of this office.

January 28, 1946.—046-27.

CRIMINAL COURT CLERK—TIME FOR QUALIFYING

QUESTION: What is the last day permitted a candidate for the office of clerk of the criminal court of record of Palm Beach county to qualify in the 1946 primaries?

To Honorable J. Louie Carter, Clerk Criminal and County Courts, West Palm Beach, Florida:

It is here assumed that no local or special law pertaining to this question and applicable to the above county is here involved, and this opinion is conditioned upon such assumption.

Under the provisions of Section 102.33, Florida Statutes, 1941, a candidate to be voted for wholly within a single county, shall file his sworn statement and receipt for committee assessment, if any has been levied, with, and pay the required filing fee to the clerk of the circuit court of said county "not less than forty-five days previous to the day of the primary election." A candidate for clerk of a criminal court of record comes within the purview of this section.

The computation of this forty-five day period is accomplished by excluding the first and including the last day of the period; and the forty-fifth day previous to the date of the first primary, reached by such computation, is the last day such a candidate may qualify. *Crawford, et al. vs. Fedder, et al.*, 27 Fla. 523, 8 So. 642; *State vs. Town of Winter Park, et al.*, 25 Fla. 371, 5 So. 818; *State ex rel. Ashton vs. Harris, et al.* (Fla.), 155 So. 100.

In view of the foregoing, it appears your question properly is answered as follows:

Since May 7, 1946, is the date of the first primary, the last date a candidate, as described in the above question, may qualify, under the provisions of Section 102.33, Florida Statutes, 1941, is March 22, 1946; and he must qualify, as contemplated by law, by twelve o'clock noon of said last day. Chapter 22760, Laws of Florida, Acts of 1945.

January 7, 1946.—046-5.

STATEMENT OF CERTAIN CANDIDATES

QUESTION: Should the secretary of state accept the sworn statements of candidates in the 1946 primaries, for nomination for the offices of county solicitor and judge of the criminal court of record, if the same are tendered to such official?

To Honorable R. A. Gray, Secretary of State:

Section 102.67, 1943 Supplement to Florida Statutes, 1941, provides, in part, that a candidate for nomination for appointment or election to the office of county solicitor or to the office of judge of the criminal court of record, should file the sworn statement with and pay the filing fee to the secretary of state within the time provided in said section.

It is recognized that Section 102.33, Florida Statutes, 1941, provides, in effect, that a candidate for nomination for an office to be voted for wholly within a single county should file his sworn statement with and pay his filing fee to the clerk of the circuit court of such county. However, it appears that the mentioned provisions of said Section 102.33 must yield to the requirements of said Section 102.67.

In view of the foregoing, it would appear that properly the above question is answered in the affirmative, that is to say, that the secretary of state should accept sworn statements and filing fees of such candidates, as provided by said Section 102.67.

January 10, 1946,—046-11.

FEE OF LEGISLATIVE CANDIDATE

QUESTION: What is the amount of filing fee required of a candidate for the office of member of the house of representatives in the 1946 primary election?

To Honorable Jess Mathas, Clerk of the Circuit Court, Volusia County, DeLand, Florida:

The proper filing fee would be 3% of the ordinary compensation of such office, that is: 3% of \$360. (See Section 102.31, Florida Statutes, 1941.)

The fact that there was an extraordinary session of the legislature in 1945 and that the compensation of the members of the house of representatives was thereby increased, I do not think would affect the amount required for such candidate in the 1946 primary. I feel sure that it was the intention of the legislature to attempt to get a filing fee based on the average compensation of candidates.

Furthermore, I am informed that in the past the state department has recognized this intent of the legislature and has construed the law in the case of filing fees of state senators to be 3% of the average compensation, to wit: 3% of \$360. I think this is the correct rule.

BOND ELECTIONS

April 16, 1946.—046-158.

SCHOOL DISTRICT BOND ELECTIONS—LIST OF FREEHOLDERS

QUESTION: Where it is planned to call an election for a vote on a proposed issue of special tax school district bonds, how may the county board of public instruction obtain a list of the freeholders qualified to vote in the election?

To Honorable Colin English, State Superintendent of Public Instruction:

You have explained that the question has arisen in a case where the special tax school district boundary lines do not correspond with the voting precinct lines, and for that reason the supervisor of registration says that it is impossible for him to furnish a list of the qualified freeholders of the tax school district. No doubt it may be somewhat difficult to determine, under the circumstances, which of the freeholders of a certain precinct may be within or without the boundary of the special tax school district, but it is not at all impossible.

School code statutes relating to the issuance of bonds by tax school districts make no special provision for compiling a list of district freeholders; accordingly, Section 103.06 of the statutes which covers special tax school districts as well as other political subdivisions, is applicable and governs the question. Under that section it is the duty of the supervisor of registration to prepare and certify a list of the names of all qualified electors appearing on the registration books who are determined to be freeholders residing in the district, and further imposes on him the duty to make such investigation as will warrant the conclusion that all freeholders on the said list are qualified to vote in the district election and that the list is a complete list thereof.

You will note that consistent and similar requirements are specifically set out in the school code for the regular biennial school district election and elections to organize school districts. Section 236.32 (1) (e) and Section 236.32 (2) (b) each requires the supervisor of registration to supply on demand, and upon payment for his service, a certified list of the voters of the tax school district who pay a tax on real or personal property. The statutes relating to all other types of tax school district elections contain provisions which impose the same duty on the supervisor of registration.

It is my opinion that it is the duty of the supervisor of registration to prepare and certify a list of freeholders qualified to vote in the school district bond election upon the request of the county board of public instruction, and where the precinct lines and tax school district lines do not correspond the supervisor of registration shall make such inquiries and investigations as may be possible to determine which of the registered freeholders of any precinct reside in the tax school district.

I enclose herewith copy of an opinion which I gave to the supervisor of registration of another county on March 30, 1946, covering the manner and method of registering freeholders for school district bond elections during the period when the registration books are closed to registration for the approaching general primary.

CHAPTER VIII

OFFICES, OFFICERS AND RECORDS

PERSONS ELIGIBLE TO OFFICE; RETIREMENT, EXPENSES

October 16, 1945.—045-324.

COUNTY OFFICERS AND EMPLOYEES—TRAVELING EXPENSES

QUESTION: Can county officials and county employees traveling on official county business have the privilege of charging 7½c per mile under Chapter 22830, Acts of 1945?

To Honorable James W. West, County Attorney, Bushnell, Florida:

In my opinion this act refers to state officers and employees only when traveling on state business and does not contemplate county officials or county employees. Therefore, your question is answered in the negative.

October 3, 1946.—046-418.

COUNTY ROAD SUPERINTENDENT—SCHOOL BOARD

QUESTION: Is a county road superintendent eligible to hold the office of county school board member?

To Honorable R. H. Rollins, Superintendent of Public Instructions, Stuart, Florida:

Article XVI, Section 15, of the State Constitution reads as follows:

"No person holding or exercising the functions of any office under any foreign government, under the government of the United States, or under any other state, shall hold any office of honor or profit under the government of this state; and no person shall hold, or perform the functions of, more than one office under the government of this state at the same time; Provided, notaries public, militia officers, county school officers and commissioners of deeds may be elected or appointed to fill any legislative, executive or judicial office."

The county road superintendent is an employee rather than officer, but even if he were a county officer he would be eligible under the exception in the above constitutional provision to be elected or appointed to the office of school board member.

August 15, 1946.—046-345.

TAX COLLECTORS—AUTOMOBILE EXPENSE

QUESTION: Is a bill for \$250.00 for automobile expense incurred in connection with official duties as tax collector chargeable as a legal expense against the county?

To Honorable Fred J. Armistead, Tax Collector, Highlands County, Sebring, Florida:

I know of no law requiring the county to reimburse an official for such expense.

August 30, 1946.—046-364.

SUSPENSION—ELIGIBILITY FOR PENSION

QUESTION: Where a sheriff has been convicted of a felony from which an appeal is now pending and in pursuance of Section 15 of Article IV of the constitution he has been suspended by the governor, may he be retired under Chapter 22938 of 1945, the County Officers and Employees' Retirement System, upon payment of an amount which together with the contributions he has already made would equal five per cent of his compensation over the last five years of his service?

To Honorable J. M. Lee, State Comptroller:

Under the facts set out in your question there are certain eventualities, which could result in this man resuming his office. He is at this time merely suspended from office. Under such circumstances he is not entitled to the retirement benefits of Chapter 22938, Acts of 1945.

July 3, 1945.—045-168.

COUNTY JUDGE—ELIGIBILITY FOR RETIREMENT

QUESTION: When my present term of office expires, I will have served as a county officer for a period of twelve years and will have paid into the County Officers and Employees' Retirement Fund 5 per cent of my salary for a period of 3½ years. In the event I elect to leave the accrued contribution in the retirement fund and make additional contributions for a period of 18 months, making a total contribution for a 5-year period, and do not seek re-election, or am defeated for office, would I be eligible to retire at the age of 60 years under the provisions of the said County Officers and Employees' Retirement System?

To Honorable Lewis E. Purvis, County Judge, DeSoto County, Arcadia, Florida:

Inasmuch as you will have paid into the retirement fund five per cent of your salary for a period of only three and one-half years before you leave the service of the county, it is my opinion that you cannot participate in the benefits of the retirement system for officers and employees of the counties even though after leaving the service you make, or attempt to make, additional contributions for a period of eighteen months.

July 15, 1946.—046-318.

PROBATION OFFICERS—SALARY

QUESTION: Is Mrs. Isabel Fleming entitled to the salary of probation officer of Monroe county from the time her term expired until Mrs. Singleton was appointed?

To Honorable W. A. Parrish, Chairman, Board of County Commissioners, Monroe County, Marathon, Florida:

In your statement of facts to me you say that "Isabel Fleming was appointed by Governor Caldwell as probation officer from Monroe county. Shortly, he withdrew her appointment and appointed in her place Mrs. June Williams. Before Mrs. Williams was qualified, the legislature had a special act passed which abolished the positions of juvenile judge and probation officer and made the county judge responsible for the duties therefor exercised by the juvenile judge."

The records in the capitol do not disclose that Mrs. Williams was ever appointed to such office so she does not enter into the picture.

Probation officers are state officers (*Gibbs v. Martens*, 193 So. 835).

Said Chapter 22898 having been declared unconstitutional by our supreme court (*State ex rel Watson v. Roberts*, opinion filed April 30, 1946) the office of probation officer was not affected by the said act.

If Isabel Fleming did not abandon or forfeit claim to the office of probation officer of Monroe county, then as the de jure holdover probation officer of said county she is entitled to the pay of such office until Mrs. Singleton was appointed and qualified. Whether she abandoned or forfeited her claim to the office must depend upon all the facts of the case and the application to such facts of appropriate law. This is a matter which can only be decided by the courts, and this opinion does not purport to make such ruling and your inquiry is respectfully returned to you unanswered—but analyzed so that you have my opinion of how to proceed in order to get it properly determined.

December 30, 1946.—046-527.

DEDUCTIONS FROM SALARIES—PARTICIPATION

QUESTION: It has been a year and a half since the law setting up the County Officers and Employees' Retirement System became effective, however, we still have instances of the failure of county officers and employees to either deduct or have deducted from their salary the 5% required for participation in the system, and requests that we now permit them to comply with the requirements of the law and become participants. How long do officers or employees, who were officers or employees on July 1, 1945, have to conform to the requirements of the law by deducting the 5% monthly and paying in a lump sum the back amounts due?

To Honorable C. M. Gay, State Comptroller:

I gather from your letter that such officers and employees were beyond any doubt such officers or employees on July 1, 1945.

I gather from your letter that such officers and employees have not at any time since the law became effective had their salaries or any part thereof deducted, pursuant to the act of the legislature creating the said system.

If the boards and employers of such county officers and employees failed to deduct the 5% from the salaries of such officers and employees and such officers and employees were ignorant of their rights, I think they should at this time be allowed to signify their willingness to and participate in the retirement plan provided they pay into the retirement fund 5% of their salaries from the effective date of such act, to wit: July 1, 1945, provided further, such officers and employees furnish satisfactory evidence to you that they have at no time signified an unwillingness to comply with the requirements of the plan, and at no time requested or directed of their boards or employers payment of his or her salary without the deduction of the 5%.

I do not think that such officers and employees should be penalized because their employers and boards failed to do their duty as required by the said act.

This opinion is based upon my construction of the act to the effect that all such county officers and employees by virtue of said act are probable members thereof, notwithstanding the failure of their employers or boards to make the said deductions and said county officers and employees being innocent of any act or conduct on their part which could indicate an unwillingness to participate in said plan.

I am not passing upon whether or not the manager of this county hospital, out of whose case the request for this opinion arose, is a county officer or employee.

December 21, 1946.—046-521.

CLERK—EFFECTIVE DATE OF EMPLOYMENT

QUESTION: From May 20, 1944, until May 1, 1946, a deputy clerk of the circuit court for Osceola county was on furlough without pay on account of illness. The clerk states he considered her a regular employee and one of the deputies in his office and the only reason for her absence during the above stated time was because of her illness which preceded and followed two major operations, which were performed at the local hospital and can be supported by sufficient affidavits from the hospital. Was such person under said circumstances an employee of the county on July 1, 1945, the effective date of the County Officers and Employees' Retirement System so that she might qualify for the benefits thereunder?

To Honorable C. M. Gay, State Comptroller:

On December 4, 1946, I rendered an opinion to you and held in effect that an assistant state auditor holding a commission dated June 30, 1943 which would not expire until June 30, 1947 was an employee of the State Auditing Department on July 1, 1945 and, although he was on sick leave from May 1, 1944, he had been working for the said department off and on from that date until the date of the opinion.

By virtue of the fact that this man held a commission which was in full force and effect on July 1, 1945, and continued in full force until June 30, 1947, I held that he was in the employ of the auditing department within the meaning and intent of the said retirement plan act, although said employee was not actually on the pay roll July 1, 1945, because of sick leave.

However, the situation in this case is entirely different in that this person held no commission which was in full force and effect on July 1, 1945, and the clerk, her employer, only states that he "considered her a regular employee and one of the deputies in his office" from said May 20, 1944 until her return to the office of the said clerk on May 1, 1946.

I cannot hold under these circumstances that the person was an employee of the county on July 1, 1945, although the clerk of the circuit court might consider her to be such.

I recognize that in individual cases this will cause hardships but I feel sure it would wreck the entire plan and frustrate the intent of the legislature if I should hold a person was in the employ of the county on the effective date of the act merely because the clerk considered her to be in the employ of the county. This would, in effect, be leaving to the numerous different county officials the right to determine who were and who were not in the employ of the county at the effective date of the said act.

I, therefore, answer your question in the negative.

April 3, 1946.—046-143.

SUBSISTENCE AS SALARY—RETIREMENT

QUESTION: Where a state employee, eligible to retirement under Section 112.05 of the statutes as amended, received a salary of \$50.00 per month and monthly subsistence valued at \$40.00 per month, is the value of his subsistence included in computing his final ten-year average salary?

To Honorable A. N. Anderson, Business Manager, Florida School for the Deaf and Blind, St. Augustine, Florida:

Ordinarily subsistence may not be considered a part of the employee's salary under the statute. However, I have considered all of the

facts and circumstances in this case, the nature of the employment, the very small salary, the relation of the value of the employee's subsistence to his salary, etc., and from these and the other circumstances in the case it appears to me that the Board of Control must have taken into consideration the value of this employee's subsistence when they fixed his salary. If such were the case and the Board of Control should now make a finding to that effect, it is my opinion that the value of this employee's subsistence over the last ten years of his service should be added to the salary actually paid him in money over the same period to determine his average monthly salary.

November 3, 1945.—045-348.

STATE EMPLOYEES—SUBSISTENCE ALLOWANCE

QUESTION: Under the provisions of Chapter 22830, Acts of 1945, Section 511.28, Florida Statutes, 1941, and Section 112.06, Cumulative Supplement to Florida Statutes, 1941, where a hotel inspector is stationed for a period of over thirty days in a city or town within the area of the state in which he is required to make inspections, may the State Budget Commission authorize subsistence allowance to such inspector while he is serving in such city or town, and after he has been thus stationed for a period of over thirty days, and where his home is in such city or town?

To Honorable F. C. Elliot, Acting Director, State Budget Commission:

It appears in some instances that an inspection area consists of one county and one or more inspectors are stationed in that county; in other instances, an inspection area consists of more than one county and one or more inspectors are stationed in such area. They are so stationed more or less permanently.

Chapter 22830, Laws of 1945, is a re-enactment of Chapter 21913, Laws of 1943, with increased allowances. (Section 112.06, Cumulative Supplement to Florida Statutes, 1941). The chapter allows subsistence in specified amounts to certain officers and employees when traveling in the performance of the duties of their office or employment. The chapter also provides that:

"When any state official or employee is stationed in any city or town for a period of over thirty days such city or town shall be deemed to be his post of duty and he shall not be allowed subsistence as provided herein after the said period of thirty days has elapsed unless such subsistence is allowed by the express authority of the State Budget Commission";

The purpose of the quoted portion of the statute was to allow living costs to a public officer or employee in those cases where he remained in one place more than thirty days, but only upon the express authority of the State Budget Commission.

It is my opinion that the quoted part of the chapter authorizes the Budget Commission to determine in each department instance—and where the employee involved is not a member of a class or department, subject to group classification, then in each employee instance—whether the employee (in the instant case an inspector) is within the meaning of the act, and if found to come within the meaning of the act it becomes the responsibility of the Budget Commission, and it has the authority under the law so to do, to allow subsistence beyond the thirty-day period for time spent by such employee (or group of employees) in the city or town in which he (or they) is (or are) stationed, regardless of whether or not his (or their) home is in that city or town.

November 1, 1945.—045-346.

STATE EMPLOYEES—SERVICE CREDIT

QUESTIONS: 1. An employee of the board, first appointed on July 1, 1915, and reappointed before the beginning of each fiscal year up to and including July 1, 1945, elects to retire after thirty years' continuous service with the state. During the period 1915-1945, while a duly appointed employee of the board, he was on several occasions paid in full from federal funds when lack of state funds made it necessary to obtain federal aid in the eradication of citrus canker or Mediterranean fruit fly. The time this inspector remained on the federal pay roll varied from a few months to a year. Can this employee, in computing his thirty years' continuous service with the state, include the period or periods during which he was paid from federal funds?

2. An employee of the board entered the armed forces on July 1, 1917, to serve in the First World War. Upon his discharge, he returned to the employ of the board. Can this employee include as part of his thirty years' continuous service, or aggregate of thirty-five years, the time of military service in World War No. I?

To Honorable Arthur C. Brown, Plant Commissioner, Gainesville, Florida:

In order to qualify for one of the retirement privileges under Section 112.05, Florida Statutes, 1941, all that is required is (1) that he be a state employee, and (2) that he shall have served the state for the requisite period. Under the circumstances stated in your question, it is my opinion that the employee is entitled to include in his thirty years of consecutive service the time for which he was paid from federal funds.

Your second question is answered in the affirmative. Section 112.05 as amended by Chapter 22828, Laws of 1945, provides that military service in the armed forces of the United States shall be computed as a part of the time required to entitle the state employee to the benefits of the act.

The remainder of the questions submitted in your letter of September 28 relate to Chapter 22831, Laws of 1945, State Officers and Employees' Retirement Act. That act is under the administration of the state comptroller. On October 3 I forwarded a copy of your letter to the comptroller for his attention. You may take up with him further the matter of answers to your questions under the latter act. In the event you should not hear from him, and if I can be of further service in this respect, please let me know.

December 4, 1946.—046-496.

SICK LEAVE—RETIREMENT STATUS

QUESTION: An assistant state auditor, holding a commission dated June 30, 1943, which does not expire until June 30, 1947, was not on the pay roll of the State Auditing Department on July 1, 1945, because he was on sick leave from May 1, 1944. He has been working, however, for the department off and on during that period. Was such assistant state auditor an officer of the State of Florida, within the meaning of the State Officers and Employees' Retirement Act, at the time that the State Officers and Employees' Retirement System became effective, to wit, July 1, 1945?

To Honorable C. M. Gay, State Comptroller:

Section 2 (1) of Chapter 22831, Acts of 1945, says:

“State officers and employees' shall include all full-time officers or employees except day laborers who receive compensation for services rendered from state funds or from funds of the State Board of Administration . . .”

In my opinion, it was the intention of the legislature, unless very exceptional circumstances should arise, to require such state officers and employees who were to receive the benefits under this chapter and who were in the employ of the state on July 1, 1945, to have also been on the pay roll on that date.

I think a careful reading of the chapter will bear me out in this conclusion.

The facts you have given me in this case make it fall within one of the exceptional circumstances; the said assistant state auditor held a commission on July 1, 1945; he was, therefore, in the employ of the state, but was not on the pay roll for the reason, and the only reason, that he was on sick leave at that time.

Because of this exceptional circumstance, I think that such assistant state auditor holding the commission and on sick leave on July 1, 1945, was an officer within the meaning of the State Officers and Employees' Retirement Act, Chapter 22831, Acts of 1945.

This opinion is in nowise to be construed as giving to this officer credit for the time he has been or shall be out on such sick leave.

December 27, 1945.—045-398.

TEACHER RETIREMENT AS STATE EMPLOYEE

QUESTIONS: 1. A member of the faculty at the University who was a member of the Teachers' Retirement System, after reaching the age of seventy subsequent to the 1945 amendment of Section 112.05, made application for retirement under the Teachers' Retirement System. He later withdrew his application before any action was taken thereon by the Teachers' Retirement System. He has served more than twenty consecutive years as such state employee. May he elect to retire under Section 112.05 as amended rather than under the Teachers' Retirement Act?

2. If the foregoing question is answered in the affirmative will the applicant forfeit the contributions which he has made to the Teachers' Retirement System?

To Honorable J. M. Lee, State Comptroller:

Section 112.05 as amended applies to any state official or employee except those excluded by the last sentence which reads: "This section shall not affect any State official or employee who has already retired under any retirement Act."

I have verified the fact that this applicant's application for retirement under the Teachers' Retirement System was withdrawn and his check sent with his application returned to him before any action was taken on his application. Under the circumstances in this case, this applicant has not retired under the Teachers' Retirement Act, and therefore, the last sentence of Section 112.05 does not bar him from its benefits.

There remains to be considered whether the retirement act itself would bar the applicant from retiring under Section 112.05. Section 238.13 of the Statutes of 1941, is a part of the Retirement Act, and reads as follows:

"No other provision of law in any other statute which provides wholly or partly at the expense of the State of Florida for pensions or for retirement benefits for teachers of the said State, their widows, or other dependents, shall apply to members or beneficiaries of the retirement system established by this Act, their widows or other dependents. No person who shall become a teacher as defined herein, after the first day of July, nineteen hundred and thirty-nine, shall be eligible for a pension under any statute heretofore enacted."

The first part of the quoted section does not bar the applicant because Section 112.05 is not a statute "for pensions or for retirement benefits for teachers." It is a statute applicable to all state officials and employees. I construe the first part of Section 238.13 to deny to members of the Teachers' Retirement System only such other statutory pensions as may be exclusively for teachers, such as the teachers' pension given by Section 231.50 as amended.

The second part of Section 238.13 does not bar the applicant from the benefits of Section 112.05 because the applicant was a teacher as defined in the Retirement Act long before July 1, 1939 and therefore did not "become a teacher . . . , after the first day of July, nineteen hundred and thirty-nine."

It is my opinion therefore that the applicant may elect to retire under Section 112.05 as amended, and further, that he may do so without forfeiting his accumulated contributions. Those contributions may be withdrawn.

February 5, 1946.—046-45.

RETIREMENT—EMPLOYEE

STATEMENT: Application of J. V. Gist for retirement under Section 112.05, Florida Statutes, 1941, as amended by Chapter 22828, Laws of 1945.

To State Plant Board of Florida, Tallahassee:

I have examined the excerpt from the proposed minutes for the meeting of your board to be held February 21, 1946, authorizing the retirement of Mr. J. V. Gist, which excerpt was submitted with your letter of February 4, 1946.

It is my opinion that the evidence submitted is sufficient to show that the applicant, J. V. Gist, has served the state as an employee for more than thirty consecutive years and that therefore he is entitled to the benefits of said act.

I have examined the resolution and the same is hereby approved as to form and sufficiency.

February 5, 1946.—046-46.

RETIREMENT—EMPLOYEE

STATEMENT: Application of P. L. Reed for retirement under Section 112.05, Florida Statutes, 1941, as amended by Chapter 22828, Laws of 1945.

To the Board of Control of Florida, Florida State College for Women:

I have examined the excerpt from the proposed minutes for the meeting of your board to be held February 21, 1946, authorizing the retirement of Professor Reed, which excerpt was submitted with your letter of February 4, 1946.

It is my opinion that the evidence submitted is sufficient to show that the applicant is over the age of seventy years and has served the state as an employee for as much as twenty consecutive years and that therefore he is entitled to the benefits of the above act.

I have examined the resolution and the same is hereby approved as to form and sufficiency.

July 6, 1944.—046-534.

RETIREMENT ELIGIBILITY—PROFESSOR W. B. HATHAWAY

To the State Board of Control:

I have examined the excerpt from the minutes of the board relating to the retirement of Professor W. B. Hathaway, under Section 112.05, Florida Statutes, 1941. It is my opinion that the evidence furnished is sufficient proof that Professor Hathaway is entitled to the retirement benefits provided by that section of the statutes.

I have examined the proposed resolution of the board for the retirement of Professor Hathaway and the same is hereby approved.

August 31, 1944.—046-535.

RETIREMENT ELIGIBILITY—ELLA SCOBLE OPPERMAN

To the State Board of Control:

I have examined the excerpt from the minutes of the board relating to the retirement of Miss Opperman, under Section 112.05, Florida Statutes of 1941. It is my opinion that the evidence submitted is sufficient proof that Miss Opperman is entitled to the retirement benefits provided by that section of the statutes.

I have examined the proposed resolution of the board for the retirement of Miss Opperman and the same is hereby approved.

March 7, 1945.—046-536.

RETIREMENT ELIGIBILITY—MR. J. G. KELLUM

To the State Board of Control:

I have examined the excerpt from the minutes proposed for the meeting of the Board of Control to be held on March 17, 1945, covering the retirement under Section 112.05, Florida Statutes, 1941, of Mr. J. G. Kellum, submitted with your letter of March 7, 1945.

It is my opinion that the evidence submitted is sufficient to show that Mr. Kellum is entitled to the benefits of that act.

I have examined the resolution and the same is hereby approved.

August 22, 1946.—046-545.

RETIREMENT ELIGIBILITY—T. VAN HYNING

To Mr. J. T. Diamond, Secretary, Board of Control, Florida State College for Women:

I have examined the excerpt from the minutes of the meeting of your board held on August 10, 1946, authorizing retirement of Dr. T. Van Hyning, which excerpt was submitted with your letter of August 20, 1946.

It is my opinion, that the evidence submitted is sufficient to show that the applicant has served the state as an employee for more than thirty consecutive years and that, therefore, he is entitled to the benefits of said act.

I have examined the resolution and the same is hereby approved as to form and sufficiency.

April 20, 1945.—046-537.

RETIREMENT ELIGIBILITY—JUDGE H. C. PETTEWAY

To Honorable Grady Burton, Attorney and Counsellor at Law, Wauchula, Florida:

In pursuance of a memorandum from the undersigned to the attorney general under date of March 31, 1945, a copy of which is hereto attached, I beg leave to state that the attorney general has authorized me to inform you of his approval of the eligibility of Judge Petteway and his opinion that such eligibility has been sufficiently established. This in reply to your letter of March 26, 1945, and in compliance with your request upon me through Honorable Don Register.

I also hand you herewith a copy of this letter and said memorandum to be used as a part of the bar association's record in this matter.

September 13, 1946.—046-546.

RETIREMENT ELIGIBILITY—P. F. ROBERTSON

To the State Plant Board:

I have examined the excerpt from the proposed minutes for the meeting of your board to be held September 20, 1946, authorizing the retirement of Mr. P. F. Robertson, which excerpt was submitted with your letter of September 7, 1946.

It is my opinion that the evidence submitted is sufficient to show that the applicant, P. F. Robertson, has served the state as an employee for more than thirty consecutive years and that, therefore, he is entitled to the benefits of said act.

I have examined the resolution and the same is hereby approved as to form and sufficiency.

September 13, 1946.—046-547.

RETIREMENT ELIGIBILITY—MERTON LEROY

To the State Plant Board:

I have examined the excerpt from the proposed minutes for the meeting of your board to be held September 20, 1946, authorizing the retirement of Mr. Merton LeRoy, which excerpt was submitted with your letter of September 7, 1946.

It is my opinion that the evidence submitted is sufficient to show that the applicant, Merton LeRoy, has served the state as an employee for more than thirty consecutive years and that, therefore, he is entitled to the benefits of said act.

I have examined the resolution and the same is hereby approved as to form and sufficiency.

January 7, 1943.—046-532.

RETIREMENT ELIGIBILITY—DR. E. W. BERGER

To Honorable J. T. Diamond, Secretary, State Plant Board of Florida:

1. Written application of Dr. E. W. Berger for retirement.
2. Letter of Wilmon Newell, Director of Agricultural Experiment Station, dated December 14, 1942, certifying that the records of said Station show Dr. E. W. Berger was employed as entomologist at the

station from May 1, 1906, to June 30, 1911, inclusive, a period of five years and two months; and was employed as state inspector of nursery stock under Chapter 6156, Acts of 1911, from July 1, 1911, to April 30, 1915, inclusive, a period of three years and ten months.

3. Letter of Wilmon Newell, State Plant Commissioner, dated December 14, 1942, certifying that Dr. Berger is now over 73 years of age; and that according to the records of the State Plant Board, Dr. Berger was employed by the State Plant Board from May 1, 1915, as Entomologist, to the date of said letter; that in the aggregate Dr. Berger has been employed by the State of Florida for more than thirty-six years; that the records of the State Plant Board show salary of Dr. Berger during the last ten years to be in the amounts stated in his application.

4. Affidavit of Arthur C. Brown re date of birth of Dr. Berger, same being November 29, 1869.

It is my opinion that said attached letters and affidavit make a sufficient showing to entitle Dr. E. W. Berger to retirement as provided by Chapter 20499, Laws of Florida, Acts of 1941, either (1) as an official or employee who has attained the age of seventy years or more and who has served the state for an aggregate time of thirty years or more, or (2) as an official or employee who has served the state for an aggregate time of thirty-five years or more and that such showing is sufficient upon which to predicate said resolution.

It is my further opinion that said resolution is sufficient both as to substance and form.

April 6, 1946.—046-542.

RETIREMENT ELIGIBILITY—HENRY HUNTER

To Mr. J. T. Diamond, Secretary, Board of Control, Florida State College for Women:

I have examined the excerpt from the proposed minutes for the meeting of your board to be held on April 15, 1946, authorizing the retirement of Henry Hunter, which excerpt was submitted with your letter of April 5, 1946.

It is my opinion that the evidence submitted is sufficient to show that the applicant is over the age of 70 years, and has served the state as an employee for an aggregate time of more than 30 years, and that he is entitled to the benefits of the above act.

I have examined the resolution and the same is hereby approved as to form and sufficiency.

August 22, 1946.—046-543.

RETIREMENT ELIGIBILITY—J. B. BRAGG

To Mr. J. T. Diamond, Secretary, Board of Control, Florida State College for Women:

I have examined the excerpt from the minutes of the meeting of your board held on August 10, 1946, authorizing the retirement of J. B. Bragg, which excerpt was submitted with your letter of August 20, 1946.

It is my opinion, that the evidence submitted is sufficient to show that the applicant, J. B. Bragg, is over the age of seventy years, and has served the state as an employee for more than twenty consecutive years and that, therefore, he is entitled to the benefits of the act.

I have examined the resolution and the same is hereby approved as to form and sufficiency.

November 1, 1946.—046-544.

RETIREMENT ELIGIBILITY—EMORY SIZEMORE

To Honorable J. T. Diamond, Secretary, Board of Control, Florida State College for Women:

I have examined the excerpt from the proposed minutes of the meeting of the Board of Control to be held on November 8, 1946, authorizing retirement of the above named state employee, which excerpt was submitted with your letter of October 31st.

It is my opinion that the evidence submitted is sufficient to show that the applicant has served the state as an employee for more than thirty consecutive years and that, therefore, he is entitled to the benefits of such act.

I have examined the resolution and the same is hereby approved as to form and sufficiency.

For the name of J. M. Lee in Section 3 of the resolution there should be substituted C. M. Gay.

June 7, 1944.—046-533.

RETIREMENT ELIGIBILITY—DR. WILLIAM G. DODD

To the State Board of Control:

I have examined the attached excerpt from the minutes of the board relating to the retirement of Dr. William G. Dodd under Section 112.05, Florida Statutes, 1941. It is my opinion that the evidence submitted is sufficient to show that Dr. Dodd is entitled to the provisions of that act.

I have examined the resolution and the same is hereby approved.

May 3, 1946.—046-549.

RETIREMENT ELIGIBILITY—C. A. BASS

To the State Board of Control:

I have examined the excerpt from the proposed minutes for the meeting of your board to be held on May 10, 1946, authorizing the retirement of C. A. Bass, which excerpt was submitted with your letter of May 2, 1946.

It is my opinion that the evidence submitted is sufficient to show that the applicant, C. A. Bass, has served the state as an employee for more than thirty consecutive years, and that, therefore, he is entitled to the benefits of said act.

I have examined the resolution and the same is hereby approved as to form and sufficiency.

September 14, 1946.—046-548.

RETIREMENT ELIGIBILITY—ARTHUR R. SEYMOUR

To the State Board of Control:

I have examined the excerpt from the proposed minutes for the meeting of your board to be held September 20, 1946, authorizing the retirement of Arthur R. Seymour, which excerpt was submitted with your letter of September 12, 1946.

It is my opinion that the evidence submitted is sufficient to show that the applicant is over the age of seventy years and has served the state as an employee for as much as twenty consecutive years and that, therefore, he is entitled to the benefits of the above act.

I have examined the resolution and the same is hereby approved as to form and sufficiency.

December 12, 1945.—046-541.

RETIREMENT ELIGIBILITY—S. B. KENNARD

To the State Board of Control:

I have examined the excerpt from the minutes proposed for the meeting of the Board of Control of December 17, 1945, covering the retirement of S. B. Kennard under Section 112.05, Florida Statutes, 1941, as amended, which excerpt was submitted with your letter of December 10.

It is my opinion that the evidence submitted is sufficient to show that S. B. Kennard is over the age of 70 years and has served the state as an employee for as much as twenty consecutive years and that therefore he is entitled to the benefits of that act.

I have examined the resolution and the same is hereby approved.

December 12, 1946.—046-540.

RETIREMENT ELIGIBILITY—MISS LUCRETIA McILVAINE

To the State Board of Control:

I have examined the excerpt from the minutes proposed for the meeting of the Board of Control of December 17, 1945, covering the retirement of Miss Lucretia McIlvaine under Section 112.05, Florida Statutes, 1941, as amended, which excerpt was submitted with your letter of December 7.

It is my opinion that the evidence submitted is sufficient to show that Miss McIlvaine has served the state as an employee for more than thirty consecutive years and therefore is entitled to the benefits of that act.

I have examined the resolution and the same is hereby approved.

November 1, 1945.—046-539.

RETIREMENT ELIGIBILITY—DR. N. M. SALLEY

To the State Board of Control:

I have examined the excerpt from the minutes proposed for the meeting of the Board of Control to be held on November 10, 1945, covering the retirement under Section 112.05, Florida Statutes, 1941, of Dr. N. M. Salley, submitted with your letter of October 31, 1945.

It is my opinion that the evidence submitted is sufficient to show that Dr. Salley is entitled to the benefits of that act.

I have examined the resolution and the same is hereby approved.

November 1, 1945.—046-538.

RETIREMENT ELIGIBILITY—PROFESSOR L. S. BARBER

To the State Board of Control:

I have examined the excerpt from the minutes proposed for the meeting of the Board of Control to be held on November 10, 1945, covering the retirement under Section 112.05, Florida Statutes, 1941, of Professor L. S. Barber, submitted with your letter of October 31, 1945.

It is my opinion that the evidence submitted is sufficient to show that Professor Barber is entitled to the benefits of that act.

I have examined the resolution and the same is hereby approved.

May 21, 1946.—046-230.

SPECIAL STATUS—CHANGE OF RETIREMENT ELECTION

QUESTION: A former member of the teaching staff at the Florida State College for Women, who had been placed on "special status" and who although an inmate of the Florida State Hospital since 1942, continued to receive his special status salary until November 1945, personally, and presumably without approval of his guardian, notified the comptroller after July 1, 1945, of his desire to reject the provisions of the State Officers and Employees' Retirement Act. In December, 1945, he was retired under Section 112.05. May he now withdraw from the benefits granted him under Section 112.05 and be retired under the State Officers and Employees' Retirement Act on the request of his guardian?

To the Board of Control, Florida State College for Women:

For a better understanding of the question it will be necessary to recite certain facts. It appears that after 27 consecutive years of teaching at the college the teacher became ill and was placed on "special status" on July 1, 1937. Some time prior thereto the Board of Control had adopted a plan for special status for the teachers of the institutions of higher learning who might have become incapable of full-time work, etc. This special status policy included provision for reduced compensation, based, in part, upon length of service. In December, 1942, the teacher was adjudged insane by the county judge and committed to the Florida State Hospital. The teacher continued to be, and is now, an inmate of that hospital. At the time of his commitment a guardian was appointed for him. He was continued on special status which in this instance included salary of 47% of his full-time final salary prior to 1937 until November 1945, at which time he was retired under Section 112.05 on the basis of 30 consecutive years of service. The papers prepared for his retirement under Section 112.05 disclose none of these facts except the 30 years of consecutive service, part of which was on special status, and that he was no longer capable of performing any service. The papers do not disclose whether his retirement under Section 112.05 was with the knowledge, consent or approval of his guardian. There was no reference in the papers to the mental condition or whereabouts of the teacher.

The guardian contends that the teacher is entitled to the benefits of the State Officers and Employees' Retirement Act, under the total disability provision, Section 121.07, Cumulative Supplement, and without making any contribution whatever to that retirement system.

Several incidental and collateral questions readily present themselves but they may be disregarded. A sufficient and negative answer to the question submitted is found in Section 121.02(1), Cumulative Supplement, which defines "State officers and employees." That section reads as follows:

"'State officers and employees' shall include all full-time officers or employees, except day laborers, who receive compensation for services rendered from state funds or from funds of the state board of administration or from funds of closed bank receivership accounts or from funds of any state institution, except such officers and employees as are excepted from the provisions of Sections 121.16 and 121.17."

Even if it was lawful to put this teacher on "special status" in 1937, he had been an inmate of the state hospital for more than two years prior to July 1, 1945, the effective date of the State Officers and Employees' Retirement Act. No inmate of the Florida State Hospital could be a full-time officer or employee of the state. Only those who were full-time employees or officers of the state on July 1, 1945, or thereafter, are eligible for the benefits of that act. It does not apply to former employees. See Section 121.05, Cumulative Supplement. For the reason stated, if no other, the teacher is not eligible for retirement under the State Officers and Employees' Retirement Act.

July 3, 1946.—046-290.

"CONSECUTIVE" RIGHTS—RETIREMENT

QUESTION: Where a university employee entered state service on October 1, 1914, was granted a one-year leave of absence on account of poor health on July 1, 1920, and being unable to resume work at the end of the leave of absence voluntarily resigned, but on October 17, 1921 was employed by the State Plant Board, where she has continued her service to this date, may she now retire under Section 112.05, Florida Statutes, 1941, as amended? She has not reached the age of 70 years.

To Honorable Arthur C. Brown, Plant Commissioner, State Plant Board of Florida, Gainesville, Florida:

It is my opinion that when a state employee voluntarily resigns a position, such severance operates to cause a loss of "consecutive" retirement rights as of that date, under Section 112.05, and subsequent reinstatement does not restore them.

July 2, 1946.—046-284.

RESIGNATION—EFFECT ON RETIREMENT RIGHTS

QUESTION: Is an employee of the State Plant Board entitled to retire under Section 112.05, Florida Statutes, 1941, although he, in the course of employment from 1915 to date, was requested to resign for a two-months period because of a reduced legislative appropriation resulting in a field force curtailment?

To Honorable Arthur C. Brown, Plant Commissioner, State Plant Board of Florida, Gainesville, Florida:

It is assumed that the employee of whom you write has not attained the age of seventy years or more.

My investigation of the general law causes me to believe that a state employee who is removed from his employment against his will does not necessarily lose his retirement rights, and it is my opinion, where the time of unemployment is as little as two months, and is under the circumstances which you relate, that the employee is restored to his right of retirement upon his reemployment.

COMMISSIONS

January 29, 1945.—045-21.

DEPUTY SHERIFFS—PREMIUM ON BOND

QUESTION: Is it required that a deputy sheriff pay the premium on his bond out of his personal funds, or may it be paid from county funds?

To Honorable S. C. M. Thomas, Sheriff, Marion County, Ocala, Florida:

Section 113.07, Florida Statutes, 1941, requires public officials to post surety company bonds and authorizes payment of the premiums from public funds. However, even if a deputy sheriff were a public official within the meaning of that act, deputy sheriffs are specifically excluded from its provisions, and so far as deputy sheriffs are concerned, the law does not permit such payments out of county funds.

VACATING OFFICE

July 31, 1945.—045-207.

LEGISLATURE—RESIGNATION OF MEMBER—PROCEDURE

QUESTION: May a duly elected member of the legislature legally resign his position and if so, to whom, and what is the proper procedure?

To Honorable Millard F. Caldwell, Governor:

There does not seem to be exact applicable authority as to the person or persons to whom a member of the legislature should resign, but it seems plain that he may do so, and during the recess of the legislature at least, the resignation should be sent to the chief executive; this because of the necessity of calling a special election to fill the vacancy.

The question of vacating office is dealt with by Section 114.01, Florida Statutes, 1941, which reads in part as follows:

"Every office shall be deemed vacant in the following cases:

"(1) By the death of the incumbent.

"(2) By his resignation."

The other sections of the act are not material to this inquiry.

In the annotations of this section I do not find a case dealing with a member of the legislature, but I do find an advisory opinion to the governor which would seem to parallel the facts indicated by your inquiry. I refer to the advisory opinion to the governor to be found in 79 So. 874, of which opinion the following is the material substance:

"Where a person has been elected state senator, his appointment to and acceptance of the office of county solicitor or prosecuting attorney vacates his right and status as a state senator under the election."

From this opinion it may be gleaned that the acceptance of the qualification for another office vacates the right and status of the member of the legislature so doing.

Your inquiry does not intimate whether the person resigning is doing so to assume another office, or whether, if so, the office was created or the emolument of it increased during a session within the time for which the resigning senator was elected to serve. Of course, if this office was created or the emolument increased during his term, he would be ineligible under the advisory opinion of the supreme court recently rendered in a case affecting the appointment of a circuit judge, 22 So. 2d. 458.

July 3, 1945.—045-171.

COUNTY JUDGE—VACANCY IN OFFICE

QUESTION: Judge "A" resigned effective July 1. His resignation was accepted by the governor. The new judge will not be commissioned until the governor returns. Does Judge "A" act until his successor is qualified?

To Honorable W. H. Wells, Sheriff, Flagler County, Bunnell, Florida:

When Judge "A" resigned and his resignation was accepted by the governor, this created a vacancy in the office. Section 114.01, Florida Statutes, 1941.

Article XVI, Section 14 of the constitution, providing that "all state, county and municipal officers shall continue in office after the expiration of their official terms until their successors are qualified" will not apply to the facts in this case.

I am aware that under Section 7, Article VIII, Constitution of the State of Florida, the successor to Judge "A" cannot assume the duties of his office until he is commissioned by the governor.

It is my opinion, therefore, that Judge "A," having resigned from the office and his resignation having been accepted, is no longer county judge and is without authority to act.

June 11, 1946.—046-254.

COUNTY SOLICITOR—SUSPENSION—APPOINTMENT

QUESTIONS: 1. Does the governor have the power to suspend or remove from office a county solicitor who was regularly appointed by the governor and confirmed by the state senate?

2. Upon the suspension or removal of the incumbent, does the governor have the power to appoint another person to perform the duties of the office of county solicitor?

3. In a county in which there is a criminal court of record, does the circuit court have concurrent jurisdiction with that court in the trial of criminal cases cognizable by such criminal court of record?

To Honorable Millard F. Caldwell, Governor:

I shall answer the questions separately in their numerical order.

1. Section 15, Article IV, of the Florida Constitution provides, in part, as follows:

"All officers that shall have been appointed or elected, and that are not liable to impeachment, may be suspended from office by the governor for malfeasance, or misfeasance, or neglect of duty in office, for the commission of any felony, or for drunkenness or incompetency, and the cause of suspension shall be communicated to the officer suspended and to the senate at its next session. And the governor, by and with the consent of the senate, may remove any officer, not liable to impeachment, for any cause above named. Every suspension shall continue until the adjournment of the next session of the senate, unless the officer suspended shall, upon the recommendation of the governor, be removed; * * *"

County solicitors are appointed by the governor and confirmed by the senate (Section 27, Article V, Florida Constitution) and are not among the officers liable to impeachment under Section 29, Article III, of the constitution; so are subject to suspension and removal according to the provisions of Section 15, Article IV, referred to above.

Therefore, upon any of the grounds enumerated in the latter section the governor may, between sessions of the senate, suspend a county solicitor; but, acting alone, he cannot remove such officer. Permanent removal may be effected only through the joint action of the governor and the senate. In re Advisory Opinion to Governor, 69 Fla. 508, 68 So. 450.

2. Section 15, Article IV, of the constitution further provides: "The governor shall have power to fill by appointment any office, the incumbent of which has been suspended." Under this section and other provisions of the organic law the power is clearly granted to the governor to appoint another person to perform the duties of an office such as that of county solicitor during the period of suspension of its incumbent.

In the instance of a permanent removal from office through the joint action of the governor and the senate, immediately upon such removal becoming effective the governor has the power to fill such office in all respects as though such officer had died instead of being removed; for the office has become vacant. Sections 114.01 and 114.04, Florida Statutes, 1941; In re Advisory Opinion to Governor, 69 Fla. 508, 68 So. 450.

3. Section 11, Article V, of the constitution provides, in part, that "the circuit courts shall have exclusive original jurisdiction . . . of all criminal cases not cognizable by inferior courts" and Section 25 of the same article provides that criminal courts of record "shall have jurisdiction of all criminal cases not capital which shall arise in said counties respectively."

The proper interpretation of these sections is that in a county in which there is a criminal court of record the circuit court has no trial jurisdiction of criminal cases not capital. *Cox v. State*, 63 Fla. 12, 58 So. 49. Therefore, this question should be answered in the negative.

January 21, 1946.—046-34.

PASCO COUNTY COURT OF RECORD—ELECTION OF OFFICERS

QUESTION: Will the judge and solicitor of "Court of Record of Pasco County, Florida," be required to be elected at the 1946 general election?

To Honorable Orvil L. Dayton, Jr., County Judge of Pasco County, Dade City, Florida:

I do not pass upon the constitutionality or the unconstitutionality of the said act.

I have been informed that both the solicitor and the judge of this court, who were recently appointed by the governor, have commissions which run until the 1947 term of the senate, or in other words, they both have interim appointments.

The question presents itself: Are such officers constitutional officers and if so, do Sections 6 and 7 of Article XVIII of the constitution apply, or are they statutory officers and if so, does Section 7 of Article IV of the constitution or Section 114.04, Florida Statutes, 1941, apply?

This court seems to have been created by virtue of Article V, Section 1 of the constitution being "such other courts (not therein named) . . . as the legislature may from time to time ordain and establish."

A similar court has been held to be a statutory court (*State ex rel Landis v. Dickerson*, 138 So. 376). The court of record of Pasco county being a statutory court, the officers are not constitutional officers as contemplated by Article XVIII, Sections 6 and 7 of the constitution (*Advisory Opinion to Governor*, 19 So. 2d. 198).

Section 7 of Article IV will not apply but Section 114.04, Florida Statutes, 1941, will apply.

It is, therefore, my opinion that said judge and solicitor do not have to run in the 1946 election, but hold office according to their commissions heretofore issued to them.

LEAVE OF ABSENCE

July 24, 1946.—046-316.

MILITARY LEAVE—END OF HOSTILITIES

QUESTION: Is the Florida Board of Forestry and Parks required by statute to pay military leave at this time in the event any of the employees of the board shall leave the service by reason of being inducted into the military service of the United States by draft or voluntary enlistment?

To the Florida Board of Forestry and Parks:

The term "active military service" as employed in the Florida leave of absence statute is defined to mean active duty in the Florida Defense Force or federal service in training or on active duty with any branch of the United States military service.

A period of war as legally defined is that period of time during which the territory of one nation is occupied by the military forces of another for the purpose of coercion in the administration of national affairs whether engaged in active open hostility or not. Since the period of war between the United States and foreign nations has not terminated at this time, the provisions of the military leave statute of Florida are still in effect.

The Florida statute providing for the granting of leave of absence with thirty days' pay to endure during the period that an employee shall be engaged in active military service is limited in its application to officials and employees of the State of Florida who at the time of granting the leave of absence are officers or enlisted men in the Florida Defense Force, the National Guard, the Naval Militia, Marine Corps, Unorganized Militia, United States Army Reserve, United States Naval Reserve, United States Marine Reserve, United States Coast Guard Reserve, or officers or enlisted men in any other class of the militia. In the event any employee of your board who is a member of one of the enumerated branches of the military service should be inducted, whether by draft or voluntary enlistment into the military service of the United States, he would be entitled to leave of absence for the duration of his active military service, the first thirty days of such leave to be with full pay. Any employee who at the time of his induction is not a member of one of the enumerated branches of the military service would not be entitled to leave of absence with pay.

October 13, 1945.—045-327.

VETERAN—RETURN TO FORMER POSITIONS

STATEMENT: It appears that you were called into the active service of the United States as a reserve officer March 1, 1942. You were then acting as state attorney, your term expiring July 31, 1943. Thereafter you entered on a new term for four years, beginning August 1, 1943. You were still in the service and an acting state attorney was appointed to serve until your return.

On the 7th day of October, 1945, you passed through the separation center and on October 10, 1945, you entered on terminal leave, which had been granted, and which leave would expire January 25, 1946. You desire to know if you can return to your duties as state attorney while you are on such terminal leave.

To Honorable Phillip D. O'Connell, West Palm Beach, Florida:

I understand the words "terminal leave" to mean accumulative leave which is due you, that during such accumulative leave you are on inactive status but on active duty and that you receive your full salary during such time.

Section 115.13, Florida Statutes, 1941, says:

"Upon said officer terminating his active military service, he shall immediately enter upon the duties of his office for the unexpired portion of the term for which he was elected or appointed."

Section 115.08, Florida Statutes, 1941, reads as follows:

"The term 'active military service' as used in this law shall signify active duty in the Florida defense force or federal service in training or on active duty with any branch of the army of the United States, the United States navy, the marine corps of the United States, the coast guard of the United States, and service of all officers of the United States public health service detailed by proper authority for duty either with the army or the navy, and shall include the period during which a person in military service is absent from duty on account of sickness, wounds, leave, or other lawful cause.

"The term 'period of active military service' as used in this law shall begin with the date of entering upon active military service, and shall terminate with death or a date thirty days immediately next succeeding the date of release or discharge from active military service, or upon return from active military service, whichever shall occur first."

The above stated sections in my opinion are clear in prescribing that active military service includes leave periods and it is also clear that the statute contemplates that the active military service begins with the date of entering and terminates thirty days immediately next succeeding the date of release or discharge therefrom.

One cannot be said to be either released or discharged as long as the leave which he or she has is such a leave as comes within the period of the "active military service" time. Therefore, in my opinion you are not eligible to return to your office until the termination of your present leave and you have thirty days after that termination within which to claim the office and re-enter its service.

December 18, 1946.—046-506.

COMPENSATION—METHOD OF COMPUTING

QUESTION: Is a justice of the peace, who was called into the military service of the United States during the late conflict and whose compensation of office is derived entirely from fees, entitled to compensation for the thirty-day period following the date of the leave of absence granted him by the governor as provided in Section 115.09, Florida Statutes, 1941, and if so, how should such compensation be computed?

To Honorable Thos. L. Glenn, Jr., Attorney for the Board of County Commissioners, Sarasota County, Sarasota, Florida:

On June 8, 1943, I wrote an opinion in which I held in effect that an official who derives his compensation from fees and who receives leave of absence should be paid the thirty-day full pay allowance provided by the statute, the amount of such allowance is to be ascertained as of the date the leave of absence is granted and becomes effective.

The measure of compensation to be paid such an official, granted such leave as aforesaid, when the compensation of that official consists of fees, would be the average monthly compensation of the incumbent of that office over a period of say three years or more, such compensation, however, never to exceed the statutory limit fixed by law.

November 6, 1945.—045-349.

VETERANS WHO WERE STATE EMPLOYEES—RIGHTS

QUESTIONS: 1. Is the State Board of Control obligated to give a returned veteran his old job, or can he be given any other job of comparable remuneration?

2. Will his salary be based on his salary of three years ago, or on the present salary of his former position?

3. If he should refuse a substitute job, can he demand his old position and require the demotion or discharge of the incumbent?

To the State Board of Control:

Section 115.15, Florida Statutes, 1941, adopts the federal statute (Title 50, App. Sec. 308, U. S. C. A.), in so far as it relates to re-employment of public employees granted leave of absence for active military service, and provides that any public official who fails to comply therewith shall be subject to removal from office.

The federal statute provides that a returning veteran holding certificate of service, and still qualified to perform the duties of his former position, and who within ninety days after he is relieved from service makes application therefor, "shall be restored to such position or to a position of like seniority, status, and pay."

Under the above statutes, you are required to give the returning veteran his old job under the conditions set out above or another position of like seniority, of like status, and of like pay. This is in answer to your first question.

Answering your second question, it is my opinion that restoration to his former position carries with it any increase in pay for that position which may have been made during the absence of the veteran.

What I have said in answer to your first question applies to your third question. The veteran is entitled to restoration of his former position or a position of like seniority, status and pay, even though this might require you to dismiss or find another position for the veteran's successor.

November 8, 1945.—045-365.

PUBLIC EMPLOYEES—RE-EMPLOYMENT

QUESTION: In what form must a leave of absence to enter active military service have been granted to a public employee, according to the provisions of Section 115.14, and related laws, in order to entitle such employee to re-employment in his former, or a similar position?

To Major Henry H. Cole, A. U. S., General Counsel, Veterans' Assistance Division, Selective Service System, St. Augustine, Florida:

Section 115.14, Florida Statutes, 1941 (Section 7, Chapter 20718, Acts of 1941), provides as follows:

"All employees of the State of Florida, and of the several counties of the State of Florida, and of the municipalities or political subdivisions of the State of Florida, may, in the discretion of the employing authority of such employee, be granted leave of absence under the terms of this law, and upon such leave of absence being granted, said employee shall enjoy the same rights and privileges as are hereby granted to officials under this law, insofar as may be."

Other portions of the law on this general subject provide that state, county and municipal officials, and all others who hold office under the government of the State of Florida, may be granted leave of absence to perform active military service; that application for such leave of absence shall be made to the governor and may be granted or denied by him in his discretion; that the first thirty days of such leave of absence shall be with full pay; that upon termination of his active military service, such official to whom leave of absence has been granted shall immediately enter upon the duties of his office for the unexpired portion of his term; and that the provisions of Section 8 of Chapter 720, Acts of Congress, approved September 16, 1940, in so far as it relates to the re-employment of public employees granted leave of absence under this law shall be applicable in this state, and the refusal of any state, county or municipal official to comply therewith shall subject him to removal from office. Sections 115.09, 115.10, 115.13 and 115.15, Florida Statutes, 1941.

In the ensuing discussion, for the sake of convenience and brevity, employees of the State of Florida and of the several counties, municipalities or political subdivisions of the state will be referred to as "public employees."

The legislature has unequivocally imposed the condition that in order to be entitled to the rights and privileges provided by the statutes cited above, the public employee must have been granted leave of absence by the employing authority to enter active military service. It is my opinion that the formal grant of a leave of absence is not necessary but, since the matter is discretionary with the employing authority, there must be positive proof that the leave of absence was given.

Whether such leave was granted is a question of fact, so no fixed rule can be made the test for cases in which a formal leave was not given. However, the statutes do not impose a duty upon the employing authority to grant leaves of absence to public employees entering active military service but are merely permissive in this respect, so it must be presumed that the leave of absence was not given unless the contrary clearly appears.

These conclusions are as fully in accord with the purpose and intent of Section 8 of Chapter 720, Acts of Congress, as the phraseology of the Florida Statutes will permit. That Act of Congress seeks to guarantee the re-employment of all persons who merely "left" their positions for military service, but the pertinent Florida Statutes, although adopting in part the provisions of the congressional act, specifically require that in order to be entitled to re-employment the public employee must have been granted a leave of absence to enter active military service. The latter provision cannot be nullified through interpretation.

May 22, 1946.—046-214.

TIME FOR APPLICATION FOR REINSTATEMENT

QUESTION: The executive board of the Department of Public Safety, on January 5, 1943, granted its attorney military leave of absence for the

duration of the war and six months thereafter. He has been available for reinstatement since release from military duty on January 13, 1946, and on May 14, 1946, made application to said board for reinstatement as such attorney. What are the legal rights of this former employee to reinstatement as attorney for said board in pursuance of such application?

To Honorable John T. Wigginton, Executive Secretary, Tallahassee:

Such rights as this attorney may have had for military leave of absence and reinstatement to his position upon release from such service are found in Chapter 115, Florida Statutes, 1941, and particularly Sections 115.08-115.15 thereof; and his employer had no authority to enlarge or limit such rights.

No attempt is here made to decide whether such former state employee had thirty days after release from military duty to make application for reinstatement (see said Sections 115.08, 115.09 and 115.14) or ninety days as provided by the federal act (see said Section 115.15 and amended Section 308, Title 50 App., U.S.C.A.). It appears that April 12, 1946 was the ninetieth day after this former employee's discharge from military service; hence, it seems that under the construction most favorable to this former employee, the time within which he could have made application for reinstatement to his former position has expired.

In view of the foregoing, in my opinion the above question properly is answered as follows:

Since the time within which this former state employee might have made application for reinstatement has expired, without discussing other possible phases of the question, it appears that any right he may have had to be reinstated to his former position has lapsed.

October 12, 1945.—045-321.

VETERANS—RETURN TO FORMER POSITIONS

QUESTIONS: 1. Granted that a former employee of the Florida Industrial School for Boys is entitled to re-employment by said institution upon his return from military service, under the provisions of Sections 115.11-115.15, Florida Statutes, 1941, if during his absence the salary attached to his former position was increased, should he be given such increased pay at the time he resumes such position?

2. Upon return to the employment of said institution by a serviceman, under the circumstances related above, in the event that the duties of his former position have changed in his absence, is he required to accept the position under current conditions?

To Honorable George W. McRory, Superintendent, Florida Industrial School for Boys:

It will be noted that both the above questions assume the right of the former employee to be re-employed upon his release from service, under the provisions of Sections 115.14 and 115.15, Florida Statutes, 1941, and Section 308 (b), Title 50, App. U.S.C.A. For the application of such Florida Statutes in relation to such right, attention is directed to an opinion of this office, dated June 8, 1943, Biennial Report of the Attorney General for 1943-1944, page 168, a copy of which is hereto attached.

Section 115.15, Florida Statutes, 1941, provides in part that the provisions of Title 50, App. Section 308, U.S.C.A., in so far as it relates to re-employment of public employees granted a leave of absence on active military duty under the Florida law, shall be applicable in this state. Said Section 308 provides, with respect to such public employees, that, "it is hereby declared to be the sense of the Congress that such person should be restored to such position or to a position of like seniority, status and pay."

In my opinion, the above questions properly are answered in their numbered order as follows:

1. The former employee, under the factual situation presented, would resume the position held by him at the time he entered the service subject to the salary being paid in connection therewith at the time he returned to it.

2. It is assumed from this question that while certain duties incident to the position formerly held by such an employee have been changed in his absence, the position itself, in the general plan and operation of the school, remains the same. This being true, upon return to the employment of said institution by a former employee, under the circumstances related above, in the event the duties of his former position have changed in his absence, such returned employee would resume the position subject to such changed duties incident thereto at the time of his return to it.

October 25, 1945.—045-340.

SCHOOL PRINCIPAL—RE-EMPLOYMENT

QUESTIONS: 1. Where a principal of a high school was granted a military leave of absence and later, after the principal's contract with the school expired, another person was employed by the county board to fill not only the position as principal but merged that position with the position of supervising principal of the school, is the county board required to re-employ the principal upon his discharge from the armed services?

2. If so, is he required to be re-employed only for the remainder of the present school year or for how long a period of time?

To Honorable Colin English, State Superintendent of Public Instruction:

Section 115.15, Florida Statutes, 1941, adopts the federal act relating to re-employment of veterans in the following language:

"The provisions of section 8 of Chapter 720 Acts of Congress of the United States, approved September 16, 1940 (Title 50 App. Section 308 U.S.C.A.), insofar as it relates to the re-employment of public employees granted a leave of absence on active military duty under this law, shall be applicable in this state and the refusal of any state, county, or municipal official to comply therewith shall subject him to removal from office."

The federal act requires re-employment of the veteran who shall have left a position, other than a temporary position, to go into the service, where the veteran receives a training or service certificate, and is still qualified to perform the duties of the position, and makes application for re-employment within ninety days after his discharge. If we assume that the high school principal receives this certificate, is still qualified for the position and makes application within the time, your first question is reduced to whether or not his position as a high school principal was a temporary position. If temporary, the federal act would not apply to him. If his position was not a temporary one, the federal act requires his re-employment.

The contract of a teacher or principal with the school board is for one year and in the absence of an applicable tenure statute he has no absolute right to renewal of his contract at the end of the school year. While he has no absolute right to a renewal of his contract from year to year, competent teachers and principals are, in fact, re-employed year after year in the same or higher positions in the same school. The teacher may reasonably expect renewal of his contract and his employment is more of a permanent than a temporary nature. I think it is not temporary employment within the meaning of the federal act. In my opinion the school teacher or principal is entitled to the benefit of the federal act, and entitled to be "restored to such position or to a position of like seniority, status, and pay."

Answering your second question, the federal act provides that any such person restored to a position shall not be discharged from such position without cause within one year after such restoration and I construe this to mean, when applied to a principal or teacher, that he must be given a contract or contracts for a period of not less than one school year.

May 11, 1946.—046-197.

JUDGES AND PROSECUTORS—WAR TRIAL ATTENDANCE

QUESTION: Does the governor have authority to grant a leave of absence to a judge or prosecuting attorney holding office under the laws of the State of Florida, to participate in the trials of war criminals in Germany?

To Honorable Millard F. Caldwell, Governor:

It is my understanding, and I assume, that in participating in the trials of war criminals in Germany the officers described in the question would not be engaging in "active military service," as defined in Section 115.08, Florida Statutes, 1941. Premised upon this assumption and a careful consideration of the pertinent provisions of the Florida Constitution, it is my opinion that the question should be answered in the negative.

October 30, 1945.—045-342.

ASSISTANT STATE ATTORNEY—COMPENSATION ON LEAVE

QUESTION: An assistant state attorney became an officer in the United States navy in 1942, under leave of absence from his civil office. His term of office expired in 1943, and he was reappointed for a new four-year term, but did not obtain a new leave of absence. No acting assistant state attorney was appointed to perform his duties. Since October 15, 1945, he has been on terminal leave from the navy, and has been performing the duties of assistant state attorney. Said terminal leave will expire on November 26, 1945, at which time he expects to be assigned to inactive duty. May he receive compensation as assistant state attorney for performing the duties of said office from October 15, 1945, until November 26, 1945, notwithstanding the fact that he will draw compensation as an officer of the navy for said period?

To Honorable Grady Burton, State Attorney, Wauchula, Florida:

Although your letter does not say so, I am informed by the secretary of state's office that the assistant state attorney mentioned by you was reappointed for a new four-year term beginning in 1943, and that the secretary of state's records do not show that any leave of absence was granted for the new term or that any acting assistant state attorney was appointed to perform his duties. This being so, the following statement in an opinion rendered by me on November 27, 1944, is applicable, to wit:

"... such leave of absence does not extend beyond the term of office with respect to which it is granted (Section 115.11, Florida Statutes, 1941). An application for military leave of absence for the new term beginning the first Tuesday after the first Monday in January, 1945, must be made by the county commissioner referred to in the above question."

The leave of absence granted said assistant state attorney in 1942 expired when his term of office ended in 1943, and, since he did not obtain a new leave of absence for his new term, he is not on leave of absence granted pursuant to the provisions of Sections 115.08-115.15, Florida Statutes, 1941, and is not subject to the provisions of Section 115.09, Florida Statutes, 1941, "The first thirty days of any leave of absence to be with full pay and the remainder without pay."

In an advisory opinion reported in 8 So. 2d. 26, the Florida Supreme Court said that the induction of a sheriff into the United States Army Reserve as captain did not constitute "holding or exercising functions of an office under the United States Government" so as to disqualify him to hold office under Section 15 of Article XVI of the Florida Constitution; and that no vacancy occurred when such sheriff was inducted into the service of the armed forces of the United States. In my opinion, this pronouncement is equally applicable to an assistant state attorney who is inducted as an officer in the navy. Therefore, the fact that he is still an officer of the navy does not deprive him of his civil office and, since he is not governed by the provisions of Sections 115.08-115.15 because he holds no leave of absence granted thereunder, I am of the opinion that he had the right to resume his duties as assistant state attorney while on terminal leave from the navy and that he has the right to be compensated for performing such duties while on such terminal leave.

This opinion is not intended to cover the situation that would exist if said assistant state attorney were on leave of absence granted under Sections 115.08-115.15, Florida Statutes, 1941.

March 5, 1946.—046-88.

COMPENSATION IN LIEU OF LEAVE

QUESTION: May the State of Florida lawfully pay to one of its former employees, or to his personal representative, after termination of employment by separation or death, a sum of money in lieu of an earned vacation period not taken before separation?

To The Board of Commissioners of State Institutions:

In connection with the above question, we have examined the following cases touching upon said question, of which the following seem to answer it in the negative, to wit: *State v. Case*, 172 Wash. 243, 19 Pac. 2d. 927; *Nicholson v. Amar*, 7 Cal. App. 2d. 290, 45 Pac. 697; *Vaughn v. United States*, 45 Ct. Cl. 525; *Harrison v. United States*, 26 Ct. Cl. 259; *Connelly v. State*, 44 N. Y. Supp. 2d. 331. The following other cases indicate an answer in the affirmative, to wit: *Greene v. United States*, 85 Ct. Cl. 548; *Ferguson v. United States*, 86 Ct. Cl. 606; *Butler v. United States*, 47 Ct. Cl. 39. A reading of the cases of *Greene v. United States* and *Ferguson v. United States* indicates that they were decided on an executive order which provided compensation for accumulated leaves of absence upon termination of service as such employees; and in *Butler v. United States* the claimant did not actually leave the employment of the United States but exchanged employments with an employee in another department in another location. For these reasons the authority of the above cases, as supporting an answer in the affirmative, is greatly weakened. The deciding weight of authority appears to be that no compensation in lieu of leave of absence may be paid after separation from the service of the state.

From the above and foregoing authorities it appears that the above question must be answered in the negative.

POWERS AND DUTIES OF OFFICERS

June 11, 1946.—046-255.

STATE BOARD OF BEAUTY CULTURE—PURCHASE OF AUTOMOBILE

QUESTION: May the budget of the State Board of Beauty Culture include an allowance for the purchase of automobiles for the use of members of said board in the performance of their official duties?

To Honorable Wilbur E. Whitehurst, Attorney for the State Board of Beauty Culture, Wauchula, Florida:

With certain noted exceptions within which the State Board of Beauty Culture is not included, Sections 116.12 and 116.20, Florida Statutes, 1941, expressly make it unlawful for any state officer, or agency, to purchase, or contract for the purchase of, any motor vehicle for the use of himself or another to be paid for out of the funds of the State of Florida, or any department thereof, unless the legislature should make a specific appropriation authorizing same. I find no specific appropriation for the purchase here in question.

It is, therefore, my opinion that your question, as stated above, should be answered in the negative.

February 12, 1945.—045-37.

HOTEL COMMISSION—PURCHASE OF AUTOMOBILE

QUESTION: May the Hotel Commission purchase new automobiles?

To Honorable Millard F. Caldwell, Governor:

You refer to my opinion of March 4, 1941, in which I held that such purchases could not be lawfully made by the Hotel Commission. In that opinion I construed Chapter 13810, Acts of 1929. In 1941, by Chapter 20716 (Section 116.12, Florida Statutes, 1941), the legislature made a slight change in the act, but it does not affect your question. At the same session of the legislature, there was enacted Chapter 20896, which specifically repealed Chapter 13810, as well as all other laws or parts of laws in conflict therewith, and the provisions of that chapter now appear as Sections 116.16-116.20, Florida Statutes, 1941. This present act made certain exceptions, allowing purchase of motor vehicles by certain agencies, but the Hotel Commission is not one of those exceptions. As to state agencies, departments, etc., not excepted from the act, Section 4 of Chapter 20896 (Section 116.20, Florida Statutes, 1941), in effect reenacts the provisions of Chapter 13810. Thus, it appears that so far as the Hotel Commission is concerned, it is in the same situation as it was under the original act, Chapter 13810.

In other opinions, I have made a distinction between purchase of motor vehicles which were absolutely necessary to the performance of the agency's work and purchase of motor vehicles for the use of the personnel. For example, I held that the Game and Fresh Water Fish Commission might purchase tank trucks for the hauling of fingerlings, etc., but that automobiles might not lawfully be purchased for the use of its game wardens, deputies, and agents.

In your letter you pointed out that the Hotel Commission operates within revenue it receives from the purchase of licenses and no appropriation is made for the commission. Reference was also made to the opinion of Attorney General Landis, reported in his Biennial Report of 1933-1934, page 449, in which he held that Chapter 13810 did not apply to the Hotel Commission for the reason that it was self-supporting and also for the reason that the commissioners could make a rule requiring employees to travel by automobile. I cannot agree with that opinion. The statute prohibits any state officer or employee, agency, department, or institution, other than those excepted from its provisions, to purchase or contract for the purchase of any motor vehicle for the use of himself or another, to be paid for out of funds of the State of Florida or any department thereof, unless specific appropriation were made by the legislature for the purchase of such motor vehicle. In my opinion, this clearly covers any state agency, regardless of whether or not it is self-supporting or is maintained by funds appropriated by the legislature. I

cannot find in the act anything which would make the Hotel Commission an exception by reason of the fact that it is a so-called self-supporting agency. Legislation might be obtained at the coming session, setting up a method whereby these self-supporting agencies and departments might replace needed motor vehicles which are no longer usable. For the reasons stated, and construing the present act, I adhere to my former opinion, in which I held that such purchases could not be lawfully made by the Hotel Commission.

June 20, 1946.—046-271.

HOTEL COMMISSION—PURCHASE OF AUTOMOBILE

QUESTION: Is the State Hotel Commission authorized to purchase motor vehicles?

To Honorable Terry C. Lee, Budget Director:

That the State Hotel Commission is a department of the state and that the hotel commissioner is a state officer will surely not admit of argument.

Section 116.12, Florida Statutes, 1941, makes it unlawful for any state officer or employee to purchase or contract to purchase any motor vehicle for the use of himself or herself unless there is a specific appropriation directly and expressly authorizing the purchase of such motor vehicles.

The argument has been advanced that in view of the fact that the only funds for the operation and maintenance of the State Hotel Commission are the moneys collected by the commission through licenses and fees, it is a continuing annual appropriation, that its budget is not submitted to the legislature, that, therefore, the Hotel Commission does not come within the scope of Section 116.12, *supra*. I cannot agree with this contention. The terms used in Section 116.12, *supra*, embrace any state officer with certain exceptions. It was not limited to those offices whose budget must be approved by an appropriation act; that the legislature did not intend that the Hotel Commission should have a "free hand" in the disbursement of funds is evidenced by the fact that when the surplus funds amount to \$10,000.00 or more, all in excess of \$5,000.00 shall be disposed of by the legislature. Section 511.32, Florida Statutes, 1941.

I have examined the 1945-1946 budget report to the legislature and the only mention made of the State Hotel Commission is that it is one of those subjects for which no appropriation is required in the general appropriation act. If the budget commission report had made recommendation for funds to supplement those received by the commission under the provisions of Section 511.32, *supra*, listing an item of motor vehicles and if the appropriation act had appropriated supplemental funds, it might have led me to a different conclusion.

To hold that the State Hotel Commission could purchase motor vehicles would be to open the door to every state board and office, whose funds for operation and maintenance are similarly conditioned and appropriated as the Hotel Commission's, would be holding, in effect, that it was the intention of the legislature to permit this large number of state offices and boards to do so while denying the right to those state offices and boards that are maintained and operated by funds appropriated out of general revenue. This, in my opinion, would be a most strained construction. My answer to your question is negative.

July 13, 1946.—046-317.

TRADE-IN OF AUTOMOBILE—LEGALITY OF PURCHASE

QUESTION: "Does the State Hotel Commission have the authority to replace any worn-out, obsolete, and unserviceable equipment, to wit, an automobile, trading in said equipment and paying the difference for the replacement equipment from the Hotel Commission budget?"

To Honorable J. Lee Ballard, State Hotel Commissioner:

I do not believe it was the intention of the legislature in enacting Section 116.12, Florida Statutes, 1941, to prohibit a department of the state from trading in worn-out, obsolete and unserviceable automobiles in exchange for new automobiles provided the equipment is a necessity for the proper administration of the duties of the office and further provided that the exchange is limited to article for article and no additional equipment, obtained in the exchange, even though new moneys are required in making the exchange. Such transactions, in my opinion, come within necessary and regular expenses and I do not believe Section 116.12, supra, was intended to apply in the case as here described.

In my opinion you have such authority provided: (a) the equipment is essential for the proper administration of the office and (b) you obtain the same type of equipment in exchange, and your acquisition of the new worn-out equipment was legal and within the law when originally purchased. One of the conditions of the law recognized in this opinion is that the money used to make up the balance required by the department in the trade for the purchase price of the replaced equipment must be, of course, within the budget of the department for necessary and regular expenditures.

The facts upon which this opinion are founded bring it in part within the holding in my opinion of July 3, 1941, No. 041-360 and the holding in this present opinion is predicated upon the equipment involved being worn out and unserviceable—even though motor vehicles—and being replaced by the equipment traded for, and the traded-in equipment having been originally acquired legally; and this opinion is intended to apply only in those cases where such facts exist. With these emphases, I believe this opinion follows in principle my opinion of February 2, 1945, No. 045-37, to the extent that anyone might consider that it does not, any conflicting rule so regarded as being laid down in opinion No. 045-37 is hereby recalled and renounced.

August 31, 1946.—046-365.

ANTI-NEPOTISM—EMPLOYMENT

STATEMENT: Under Section 116.10, Florida Statutes, 1941, known as the Nepotism Law, you desire to know if two applicants (or either of them) are related to you by consanguinity or affinity so that they come within the prohibitive degree of relationship as set forth in this section.

To Honorable William C. Brooker, County Judge, Hillsborough County, Tampa, Florida:

There are two methods used in computing the said degrees; one by the canon law, or the common law, and the other by the civil law. Florida has followed the common (canon) law in several instances. See cases of *Walsingham vs. State*, 56 So. 195, and *Kuehmsted vs. Turnwall*, 138 So. 775. By following the canonical rule, which is:

"Begin at the common ancestor and reckon downwards; and in whatever degree the two persons, or the most remote of them, is distant from the common ancestor, that is a degree in which they are said to be related." 12 C. J. (Consanguinity) 511, Note (c).

in my opinion, both applicants are related to you within the fourth degree, which is prohibited by the statute.

October 4, 1946.—046-425.

SCHOOL TRUSTEE—NEPOTISM

QUESTION: Does Section 116.10 of Florida Statutes, 1941, apply to school trustees?

To Honorable Colin English, State Superintendent of Public Instruction:

That section reads as follows:

"Any state officer, member of state board, county officer, member of county board or commission, city official, or his appointee, who shall knowingly employ, either directly or indirectly, any person related within the fourth degree, either by consanguinity or by affinity, to such state officer, member of state board, county officer, member of county board or commission, city official, or his appointee, shall be deemed guilty of misfeasance and malfeasance in office and subject to removal therefor; provided, however, that the provisions of this section shall not apply to the officers above who employ only one person related to them as above set out."

In *State vs. Keefe*, 149 So. 638, the court held that the above statute does not apply to the employment of school teachers but their holding in that respect would not, in my opinion, apply to employment of workmen by trustees. However, in that case the court referred to this statute as being highly penal in character and that, therefore, it was to be strictly construed.

It will be observed that the statute covers only state, county and city officials and their appointees. A school trustee is neither; he is a district officer. Even though there appears to be no reason why such a law should not cover a school district officer, as well as a state, county, or city officer, the strict construction which the court said should be used in reading this statute requires a holding that it does not apply to employment by school trustees.

I am confining my answer to your question as submitted and I wish to emphasize that this is not to be construed as holding that the employment given by the school trustee in this case, to two of his sons, one a minor, for repairs to school property was lawful. It probably was not. As to that, information in addition to that supplied would be necessary. I call your attention to Section 230.23 (12) (i) of the statutes as to school contracts, and other sections relating to expenditure of school money.

CHAPTER IX

COUNTY ORGANIZATION, OFFICERS AND REGULATIONS

COMMISSIONERS, POWERS, DUTIES AND COMPENSATION

September 5, 1946.—046-379.

VETERANS—RECORDS—CERTIFIED COPIES

QUESTION: Can the board of county commissioners pay the clerk of the circuit court for furnishing copies of public records to veterans and/or the Veterans Bureau?

To Miss Thelma Lewis, Clerk of the Circuit Court, Hamilton County, Jasper, Florida:

I know of no authority given to the county commissioners to do this. I recognize that this will cause a hardship on you but I must take the law as I find it.

As to the making of certified copies to be used by veterans in obtaining terminal pay, I herein hand you an opinion which I rendered a few days ago, which I trust will answer your question.

October 9, 1946.—046-434.

FIRE CONTROL UNITS—ESTABLISHMENT

QUESTION: What is the statutory authority and duty of the board of county commissioners of the several counties of the state with respect to the establishment and maintenance of county fire control units?

To Florida Board of Forestry and Parks:

The establishment and maintenance of county fire control units is governed by Sections 125.23 to 125.29, inclusive, Florida Statutes, 1941, as amended by Chapter 21997, Laws of 1943.

Section 125.23 declares the establishment and maintenance of county fire control units to be a county purpose.

Section 125.24 authorizes the several boards of county commissioners to establish and maintain county fire control units.

Section 125.29 provides that no county fire control unit shall be established or maintained until the establishment thereof shall be ratified by a majority of electors who cast their votes upon the express referendum question as to whether or not a fire control unit shall be established at an election held at which the referendum question is presented upon the ballot. Section 125.28 provides that the establishment of a fire control unit which has been ratified by a referendum election shall not be discontinued nor shall the maintenance thereof be suspended unless such abandonment shall be ratified by a referendum vote of the people.

Under the quoted provisions of the statute the several boards of county commissioners are vested with the authority to establish and maintain fire control units, subject to the referendum vote indicated. The exercise of the authority so granted is a matter upon which the several boards may

exercise discretion. The establishment of fire control units under agreements entered into with the Board of Forestry and Parks is not mandatory upon the several boards of county commissioners even though their authority to establish such units may have been ratified by a referendum vote.

After a fire control unit has been established and maintained by contract or agreement between the county and the forestry board in the manner provided by the statute, the maintenance and operation of the said unit may not be abandoned or discontinued, nor shall the levy of a tax for the fulfillment of the obligation of the county to maintain such unit be discontinued unless such action is likewise ratified by a referendum vote of the people at an election regularly held at which the referendum question shall be submitted.

October 8, 1946.—046-415.

POWER TO GRANT TAX EXEMPTIONS—INDUSTRIES

QUESTION: May the board of county commissioners of a county grant an exemption from ad valorem taxes to a manufacturer of automobile trailers, for a period of years, in order to procure the establishment of a plant for the manufacture of such trailers in such county?

To Honorable H. A. Rider, County Attorney, LaBelle, Florida:

It is well established in this state that county commissioners have only such powers as are granted them by statute, and may exercise only the authority conferred on them by statutory regulations; moreover, where there is doubt as to the existence of such authority none should be assumed (*Gessner v. Del-Air Corporation*, 154 Fla. 829, 17 So. 2d. 522). Chapter 125, Florida Statutes, 1941, fixes the general powers of the boards of county commissioners; none of such statutory powers appear to authorize the boards of county commissioners to grant tax exemptions. I know of no such statute in any other chapter of the statutes.

"This is a democracy in which every parcel of property is expected to bear its due portion of the burden of government, unless exempted by the legislature in the manner provided in Section 1, Article IX of the Constitution" (*Bancroft Investment Corporation v. City of Jacksonville*, Fla. 27 So. 2d. Adv. 162, text 170), or by some provision of the constitution or statutes of this state. Under Section 1, Article IX, and Section 16, Article XVI, of the state constitution only property used for municipal, educational, literary, scientific, religious or charitable purposes may be granted exemption by the legislature. The state constitution provides that "the legislature shall provide for a uniform and equal rate of taxation" (Section 1, Article IX) and that "the property of all corporations . . . shall be subject to taxation" unless used for certain purposes not here material (Section 16, Article XVI). It has been held that a power from the legislature to a municipality to make tax exemptions is invalid and in derogation of the above constitutional provision for uniformity and equality (*St. Lucie Estates v. Ashley*, 105 Fla. 534, 141 So. 738); by the same reasoning as used in that case would seem to make the same rule applicable to counties and their boards of county commissioners. Section 1, Article IX, and Section 16, Article XVI, of the constitution have been held to define and limit the exemption of property from taxation (*State v. Boring* (121 Fla. 781, 164 So. 859) unless otherwise provided by some section of the constitution. There is no constitutional provision granting to boards of county commissioners power to make provisions for tax exemptions.

From the above authorities, it is clear that the above question must be answered in the negative. However, your attention is directed to Section 12, Article IX, of the state constitution providing exemption for certain industries through 1948.

October 3, 1946.—046-424.

PAYMENT FOR MEDICAL SERVICES—LIABILITY

QUESTION: Is the county liable and may it pay bills for physician's and hospital services rendered to a negro, after the latter was shot by a deputy sheriff in the performance of the latter's duty, when taken to the physician and hospital under authority of the sheriff?

To Mr. Wilbur W. Whitehurst, County Attorney, Wauchula, Florida:

It appears that a deputy sheriff in the performance of his duty shot and seriously wounded the negro and the negro thereupon was taken by the sheriff, or by his authority and direction, to a hospital in a nearby town for attention by a physician and hospital service. Bills have now been presented by the physician and the hospital for their services to the injured negro and the bills approved by the sheriff.

In such an emergency, and the negro being in the custody of the sheriff, it was the latter's duty to promptly see to it that the injured person received necessary medical and hospital attention. One of the duties of the county commissioners, Section 125.01, Florida Statutes, 1941, is "to have care and provide for the poor and indigent people of the county." Under the circumstances in this case, and assuming that your county has neither a county hospital nor a county physician, it is my opinion that the county is liable and may lawfully pay reasonable physician's and hospital bills for necessary services rendered to the person injured by the deputy. The county, in turn, could recover from the injured person, reimbursement of these expenditures in his behalf to such extent that he might have property to satisfy a judgment.

December 5, 1946.—046-497.

PURCHASES—OFFICE EQUIPMENT

QUESTION: My office has no vault for the safekeeping of my probate records and files. I think such is necessary because my office is not fire proof and can be easily opened by outsiders. I desire to purchase a cabinet for the safekeeping of these records and charge same to the county, the county commissioners having been informed of this necessity, but they refuse to purchase the cabinet. Is this a proper county charge?

To Honorable John T. Rose, Jr., County Judge, Charlotte County, Punta Gorda, Florida:

I know of no authority which would authorize you to purchase such a cabinet and charge same to the county.

It is the duty of the county commissioners to properly provide the county offices with necessary furniture, typewriters, etc.

I think it is your duty to acquaint the county commissioners with the need for such a cabinet or some means of properly safeguarding your permanent records, and I think it would be their duty to furnish your office with same. If they refuse to do anything, I would suggest that you get their refusal a matter of record.

It may be that in a suit by a taxpayer of the county the county commissioners can be forced to properly safeguard these records by the purchase of such a cabinet, or some other means of properly safeguarding your permanent records as the court may deem necessary for the protection of such records.

December 2, 1946.—046-489.

ADDRESSING MACHINERY—MAKING PLATES

QUESTION: Sometime ago the county commissioners of Orange county authorized the expenditure of \$21,000 for the purchase and installation of addressograph equipment for the offices of the tax assessor, tax collector and supervisor of registration. Of this amount approximately \$5,000 was included for so-referred-to installation, which was, in the opinion of the county commissioners and officials of the above mentioned offices, to be used for the employment of extra help to make up the permanent record plates which constitute a major part of the equipment.

Can this item of expense be considered as part of capital investment and paid from excess fees accounts?

To Honorable C. M. Gay, State Comptroller:

Without the record plates the addressograph equipment would be valueless. I know that from time to time some of these record plates have to be changed as addresses change, but for all practical intents and purposes the nucleus of these record plates is permanent and becomes a part of the equipment. To me, the making of these plates seems as much a part of the installation of the machinery as would the service of a mechanic who actually installed the principal part thereof.

In my opinion, therefore, this item of expense can be considered as part of the capital investment and paid from excess fees accounts.

December 4, 1946.—046-494.

LAND SOLD BY MISTAKE—BILL FOR IMPROVEMENT

QUESTION: On October 18, 1946, I sold for Polk county the NE¼ of SW¼ East of Railroad Less 100 Ft. for Road, 21-28-23, to C. A. Law and Eva Law, Route 4, Box 272, Lakeland, Florida. The deed was issued, recorded and mailed to Mr. Law and subsequently was found that this property was the property of the Atlantic Coast Line although this fact did not become known until I had written a letter to Honorable C. M. Gay, comptroller, requesting the information and was informed that this property had been paid on by the Atlantic Coast Line Railroad, the value of the same being included in the valuation of track and road bed. In the meantime Mr. Law had made preparations to build on the property, having bought some house blocks and used some of his time in tractoring the land and making trips to the courthouse at Bartow in connection with the matter. Mr. Law has turned in his bill for items for which he wishes to be reimbursed as follows:

Four trips to Bartow at \$2.00. each.....	\$ 8.00
Fifteen house blocks.....	13.50
Interest on money three months (total purchase price \$180.00)	25.00
Tractoring land.....	15.00
Time lost from work.....	50.00
Plans for house	5.00
Total	<u>\$116.00</u>

What is the legal status of the liability of the county for the above bill under the circumstances as outlined?

To Honorable D. H. Sloan, Jr., Clerk of Circuit Court, Polk County, Bartow, Florida:

I know of no authority which would require the county commissioners to reimburse this man, and I do not advise payment of same.

October 10, 1946.—046-428.

USE OF EQUIPMENT—DRAINAGE—ROADS

QUESTION: Is the board of county commissioners authorized to pay from county funds the expense of cutting a ditch or small canal in a southerly direction to the Caloosahatchee river for the purpose of draining or drawing off the water which gathers on the north side of a county road known as the "North River Road," and which is damaging to the said road, and also the Denaud cemetery, which is a cemetery belonging to Hendry county, and which the county keeps up; the soil conservation service to do the engineering work required, also furnish its drag line for said project free of charge to said Hendry county, the said county to pay the expenses of the operation thereof?

To Mr. H. A. Rider, County Attorney, LaBelle, Florida:

The board of county commissioners has ample authority under Sections 125.01(1), 125.01(5), 343.01, 343.06 and 343.12 of the Statutes of 1941, to maintain county roads. If the proposed ditch or canal, in the opinion of the county commissioners is necessary to protect and preserve the county road and its property, its construction would be a part of the cost of maintenance of the road, and well within the authority of the board. I am assuming that protection of the road and the county property is the sole purpose of the project.

June 25, 1945.—045-152.

COUNTY FUNDS—DISBURSEMENT

QUESTION: May the board of county commissioners lawfully include in next year's budget (a) part of the cost of erecting a bandstand, playground and comfort station to be erected in a park, (b) part of the cost of musical instruments for certain public schools of the county, or (c) part of the expense of operating a vocational school?

To Honorable Bryan Willis, State Auditor:

Our supreme court has repeatedly held that county commissioners have only such authority, power and duties as may be given them by statute. I find no statutory authority for use of county funds, as distinguished from county school funds, for any of the three purposes mentioned. Accordingly, it is my opinion that none of the items mentioned may lawfully be included in the budget for next year.

July 25, 1946.—046-315.

COUNTY BUDGET—LEVY FOR ADVERTISING

QUESTION: Is it legal for the board of county commissioners of Bay county, Florida, to include in the budget for the next ensuing fiscal year an item of two mills to be used in advertising Bay county and to direct the tax assessor to levy two mills for such purpose on all taxable property within the county?

To Honorable H. P. Sapp, Attorney, Board of County Commissioners, Bay County, Panama City, Florida:

I assume that you have no special law authorizing such a levy to be made.

I find no law authorizing such a levy to be made.

March 11, 1946.—046-91.

DONATIONS—PRIVATE CORPORATIONS

QUESTION: Can the board of county commissioners legally make a donation to the Charlotte Hospital Association, a private corporation, not for profit?

To Mr. E. H. Scott, Clerk of the Board of County Commissioners, Charlotte County, Punta Gorda, Florida:

In my opinion the said board does not have such authority, whether the corporation is one formed for profit or not for profit.

November 3, 1945.—045-347.

TRAVELING EXPENSES—OFFICIAL BUSINESS

QUESTION: What amount per mile is to be paid to officers and employees of a county, by the county commissioners, when such officers or employees are traveling on official county business?

To Honorable James W. West, Prosecuting Attorney, Sumter County, Bushnell, Florida:

I assume that you have no special law on this subject.

I do not pass on the law applicable to specific officers, such as sheriffs, which is provided by Chapter 22587, Laws of 1945, or county commissioners, which is provided by Section 125.16, Florida Statutes, 1941.

Section 112.06, Florida Statutes, 1941, sets forth the amount to be allowed state officers and employees when traveling on state business, but I do not find any similar law which will apply to county officers and employees traveling on county business. Therefore, there is no standard to guide the county commissioners when paying such expenses of such county officers or employees.

In my opinion, such expenses should therefore be limited to the actual expenses incurred while such officers or employees are traveling on actual and necessary county business. Section 125.01, Florida Statutes, 1941, gives the county commissioners authority to pay such expenses.

As to what constitutes actual and necessary county business is beyond the scope of this opinion and must be determined as each question arises.

February 28, 1946.—046-83.

FRUIT GUARD—LIVESTOCK GUARD

QUESTION: May the board of county commissioners of Highlands county employ and pay a special officer to protect groves against fruit thieves as well as roving livestock?

To Honorable Millard F. Caldwell, Governor:

County commissioners have only such powers as are granted them by statute (Parker vs. Evening News Publishing Company, 45 So. 309). Commissioners may exercise only the authority conferred by statutory regulations (Bowden v. Ricker, 69 So. 694), and by the constitution itself (State v. Wheat, 137 So. 277). See also Gessner, et al vs. Del-Air Corporation, 17 So. 2nd. 522. "Where there is doubt as to the existence of authority, it should not be assumed." (White v. Crandon, 116 Fla. 162, 156 So. 303; Gessner, et al vs. Del-Air Corporation, supra.)

I do not find any authority either under our statutes or the Constitution of Florida for the board of county commissioners of Highlands county to employ and pay such a special officer.

I assume that Highlands county has no special law on this subject.

December 16, 1946.—046-512.

FELONY PROSECUTIONS—AUTHORITY TO APPOINT COUNSEL

QUESTION: Does the board of county commissioners have authority under Section 125.03, Florida Statutes, 1941, to appoint counsel for prosecution of felony cases (or cases over which the circuit court has jurisdiction) before the county judge (in Washington county) sitting as a magistrate's court? Our county attorney contends that this duty devolves upon the state attorney's office, and that his duty only requires that he prosecute trial cases (jury cases) before the county judge's court.

To Honorable Sam D. May, County Judge, Washington County, Chipley, Florida:

This question has confronted a great many of our smaller counties in the state, but the officers have been able to cooperate to the extent that they have worked it out satisfactorily to all concerned, that is, in most cases the state attorney, or one of his assistants, attends the sittings of county judge when acting as a magistrate in order that the state attorney's office might have full cognizance of the facts in the case which might develop at such hearing, and in the absence of one of these officers, the county attorney will attend. However, you do not seem to have that happy solution in your county.

There is no statute specifically defining the duties of an attorney employed by the board of county commissioners, Section 125.03, Florida Statutes, 1941, other than that of prosecuting all criminal cases tried before the county judge in such counties. One of my predecessors in discussing a similar question said:

"The statute however contemplates a contract between the county commissioners and such attorney and it may be that such contract might stipulate or define just what the duties in connection with such trials might be, that is, whether such attorney should prepare the affidavits and investigate cases preliminary to the issuance of warrants thereon."

I feel that the same thing could be said of preliminary examinations before a county judge.

I know of no statute which requires a state attorney, or one of his assistants to attend such hearings, and it is usually customary for them to make their own investigations.

I trust this answers your question.

August 22, 1945.—045-254.

ATTORNEY FOR BOARD—APPOINTMENT

QUESTION: Must the board of county commissioners have an attorney for said board and a prosecuting attorney regularly, or may the board hire one at such times as it needs one?

To Honorable Sidney C. Edwards, Clerk of the Circuit Court, Lafayette County, Mayo, Florida:

I assume that your county does not have a county court or criminal court of record, or court of record for the trial of criminal causes.

The position of attorney for the board of county commissioners is separate from the position of county prosecuting attorney for the county judge's court, although there is nothing in the statutes which would prohibit the county commissioners from appointing one and the same attorney to perform both services.

The appointment of a county attorney to advise the board of county commissioners is authorized by Section 125.01, Paragraph 3, Florida Statutes, 1941.

If the board of county commissioners deems it necessary to have an attorney to advise it, it can select an attorney and hire him at a regular salary or at such times as the board deems his services necessary.

In my opinion it is mandatory upon the board of county commissioners to appoint a prosecuting attorney for the county judge's court and to pay him a regular salary, and I base this opinion upon the following:

Revised General Statutes, 1920, Section 1477, reads as follows:

"It shall be lawful, and the boards of county commissioners of the several and respective counties of the State of Florida are hereby empowered, **in their discretion**, to employ an attorney-at-law to prosecute all persons, firms or corporations charged with the commission of any crime or offense against the laws of the State in or before the county judge's court." (Emphasis supplied).

This Section 1477 was afterwards amended so that in the Compiled General Statutes, 1927, Section 2155, the law was as follows:

"The board of county commissioners of the several and respective counties of the State of Florida wherein there shall be no county court or criminal court of record or court of record for the trial of criminal causes are hereby **empowered and required** to employ an attorney at law to prosecute all persons, firms and corporations, charged with the commission of any kind of offense against the laws of the state in or before the county judge's court." (Emphasis supplied).

Section 125.03, Florida Statutes, 1941, which is now the present law, reads as follows:

"The board of county commissioners of the several and respective counties of the State of Florida wherein there shall be no county court or criminal court of record or court of record for the trial of criminal causes **shall** employ an attorney at law to prosecute all persons, charged with the commission of any kind of offense against the laws of the state in or before the county judge's court." (Emphasis supplied).

Section 125.04, Florida Statutes, 1941, reads as follows:

"The compensation of the attorney so employed by the county commissioners as provided by Section 125.03 shall be not less than three hundred dollars or more than six hundred dollars per annum, payable monthly, and in addition thereto said attorney shall be entitled to and shall receive the same fees for conviction as are now or may hereafter be provided by law for attorneys in county courts as conviction fees in cases prosecuted before county court."

January 25, 1945.—045-16.

PROSECUTING ATTORNEY—EMPLOYMENT

QUESTION: Is it necessary for the board of county commissioners of Dixie county to employ a county prosecuting attorney?

To Honorable Rufus Hatch, Board of County Commissioners, Cross City, Florida:

You are advised that when this law was originally enacted, as Chapter 7331, Laws of Florida, Acts of 1917, it was in the following language:

"It shall be lawful, and the boards of county commissioners of the several and respective counties of the State of Florida are hereby empowered, in their discretion, to employ an attorney-at-law to prosecute all persons, firms or corporations charged with the commission of any crime or offense against the laws of the State in or before the county judge's court." (Emphasis supplied).

Chapter 7331 appeared in the Compiled General Laws, 1927, as Section 1477, and this section was amended by Chapter 10206, Acts of 1925, to read:

"The Board of County Commissioners of the several and respective counties of the State of Florida wherein there shall be no County Court or Criminal Court of Record or Court of Record for the trial of criminal causes are hereby empowered and required to employ an attorney at law to prosecute all persons, firms and corporations, charged with the commission of any kind of offense against the laws of the State in or before the County Judge's Court." (Emphasis supplied).

In 1943 the legislature adopted and re-enacted Florida Statutes, 1941, and at this time the word "shall" was used in place of the words "are hereby empowered and required to."

I believe it is very clear that since the amendment in 1925 it is mandatory that, in a county where there is no county court, or criminal court of record, or court of record for the trial of criminal cause, a prosecuting attorney must be employed, although prior to 1925 it would seem that such employment was entirely in the discretion of the county commissioners.

As there is no county court, criminal court of record, or court of record in Dixie county, it is my opinion that you must employ a county prosecuting attorney.

July 17, 1945.—045-188.

PROSECUTING ATTORNEY—COMPENSATION

QUESTION: Is a county liable for payment of fees to the county prosecuting attorney (one employed by the county commissioners under Section 125.04, Florida Statutes, 1941), in cases where bonds are estreated or forfeited in traffic violation?

To Honorable Elton McClellan, Chairman, Board of County Commissioners of Baker County, Macclenny, Florida:

Under Section 125.04, Florida Statutes, 1941, the attorney employed by the county commissioners, as provided by Section 125.03, Florida Statutes, 1941:

"Is entitled to not less than three hundred dollars and not more than six hundred dollars per annum . . . and in addition thereto said attorney is entitled to the same fees for conviction as are now, or may hereafter be, provided by law for attorneys in county courts as conviction fees in cases prosecuted before county courts."

The statute does not appear to contemplate anything other than a conviction fee for the prosecuting attorney in addition to the salary above mentioned.

Your question, therefore, must be answered in the negative.

September 18, 1945.—045-291.

AUTHORITY TO LEND SURPLUS FUNDS TO COUNTY BOARD

QUESTION: It appears that Liberty county has \$20,000.00 surplus in its courthouse building fund, which fund was created by the legislature by virtue of Chapter 21357, Laws of 1941. The county desires to lend the sum of \$5,676.67 to the board of public instruction of Liberty county for the purpose of said board's retiring certain school bond coupons. Notes maturing in two years will be given to the board of county commissioners by the board of public instruction. Can the board of county commissioners legally lend this surplus money to the board of public instruction of Liberty county?

To Honorable Clyde W. Atkinson, Attorney for the Board of County Commissioners of Liberty County:

The Supreme Court of Florida in the case of Gessner, et al. vs. Del-Air Corporation, 17 So. 2d. 522 says:

"It seems well established by decisions of this court that the county commissioners have only such powers as are granted them by statute . . . may exercise only the authority conferred by statutory regulations . . . and by the Constitution itself . . . Moreover, where 'there is doubt as to the existence of authority, it should not be assumed.'"

I find no statute or constitutional provision of Florida on this subject.

It is my opinion that the county commissioners have no legal authority to lend this money to the board of public instruction, even though the object may be most meritorious and the moral right strong.

February 13, 1945.—045-40.

DONATION TO UNITED STATES FOREST SERVICE

QUESTION: May a board of county commissioners lawfully make a donation of \$500.00 to the United States Forest Service for the purchase of a lot on which a dwelling house is to be built for an employee of the said forest service?

To Honorable Bryan Willis, State Auditor:

There appears to be no statutory or other authority for such donation, and it is my opinion that the question must be answered in the negative.

April 13, 1945.—045-86.

HILLSBOROUGH COUNTY—SALARIES

QUESTION: If Hillsborough county should have a population according to the 1945 state census of more than 200,000 but less than 250,000, will Chapter 11913, Acts of 1927, fix the salaries of the county commissioners in said county?

To Honorable John M. Allison, County Attorney, Hillsborough County, Tampa, Florida:

Chapter 11913, Acts of 1927, fixes the salaries of the county commissioners at \$5,000 a year in counties having a population, according to the last state census, of not less than 150,000. Chapter 17832, Acts of 1937, fixes the salaries of county commissioners in counties having a population according to the last state census of not less than 150,000 and not more than 175,000, at \$4,200 a year. You anticipate that the state census of 1945 will show Hillsborough county to have a population of more than 200,000, but less than 250,000.

The 1937 law will not apply to Hillsborough county, but, in my opinion, Chapter 11913, Acts of 1927, will apply.

April 10, 1945.—045-92.

PAYMENT OF TWO SEPARATE PURCHASES BY ONE CHECK

QUESTION: Is it lawful, under Section 125.08, Florida Statutes, 1941, to combine in one check payment for two separate and distinct purchases of material for the county where the total amount of the check would exceed \$300.00?

To Honorable Ben Coker, Clerk of the Circuit Court, Wauchula, Florida:

Section 125.08 merely requires that when materials for county purposes are purchased and the amount will exceed \$300.00, bids must be required, etc. That section has no relation to checks issued in payment for purchases, and your question is answered in the affirmative.

June 25, 1945.—045-153.

COUNTY FUNDS—EXPENDITURE

QUESTIONS: 1. May the county commissioners lawfully turn over funds budgeted and realized from a levy for county "publicity" or advertising to the county chamber of commerce to be used for such purposes?

2. If not, may such money be expended by the county commissioners for such purposes?

To Mr. Wilbur Whitehurst, Attorney for the Board of County Commissioners, Wauchula, Florida:

Our supreme court has frequently held that the county commissioners have only such authority as is conferred by statute, and has also said that where there is any doubt as to the existence of authority, it should not be assumed.

You state that you know of no special or local act authorizing expenditure of county funds for such purposes, and I have found none other than Chapter 10658, Special Acts of 1925, which authorized such a levy for your county but specifically limited it to the years 1925 and 1926.

I can find nothing in the general statutes which authorizes expenditure of county funds for such purpose. Accordingly, there being no special act authorizing it, it is my opinion that the fund may not lawfully be expended for advertising or publicity, either directly or through the county chamber of commerce.

August 18, 1945.—045-244.

TAX ASSESSORS—BILL FOR COUNTING CATTLE

QUESTION: The tax assessor of Hendry county was authorized by the county commissioners to get a count of any stock of cattle that had not been properly listed on the tax roll. The assessor attempted to carry out this request but was stopped by a writ of injunction. The count of the said cattle was abandoned and the assessor has rendered a bill to the county commissioners for his extra expense in counting said cattle. Are the county commissioners legally obligated to pay said bill from the public funds of Hendry county?

To Honorable H. A. Rider, County Attorney, Hendry County, LaBelle, Florida:

I can find no law which makes it obligatory upon the county commissioners to pay the expense of the tax assessor in thus attempting to count the said cattle for the purpose of assessing same.

July 9, 1946.—046-301.

BUDGET FUNDS—SUPPORT OF SCHOOL BOARD

QUESTION: May the board of county commissioners lawfully include in its next budget moneys to be given to the high school to be used for the purchasing of band instruments, music and the like for the high school band?

To Mr. C. A. Avriett, Attorney for the Board of County Commissioners, Jasper, Florida:

The high school band equipment would be a school purpose as distinguished from a county purpose and I find no statutory authority for use of county funds for such assistance to the school.

July 19, 1946.—046-300.

SALE OF LAND—AUTHORITY REGAINED

QUESTION: Can the county commissioners sell real property owned by the county and heretofore used by the county as a marl pit?

To Honorable H. A. Rider, County Attorney, Hendry County, LaBelle, Florida:

I find no authority for the county commissioners to sell such property. See cases of Gessner et al. v. Del-Air Corporation, 154 Fla. 829, 17 So. 2d. 522 and Volusia County et al. v. Del-Air Corporation, 25 So. 2d. 804, wherein the court held:

"That the county could not sell real property then owned and theretofore used by it, for the simple reason that it had no statutory authority to do so."

March 28, 1946.—046-113.

AUTOPSY—PAYMENT

QUESTION: An autopsy was performed by a physician at the request of the state attorney and a bill presented to the county commissioners for same. The circumstances warranted such an autopsy. Do the county commissioners have any authority or responsibility for the payment of such a bill?

To Honorable John W. Allison, County Attorney, Hillsborough County, Tampa, Florida:

I know of no statute covering this subject; therefore, it is my opinion that as a matter of governmental policy, if the county commissioners are satisfied that the bill was made in good faith and is reasonable, they would be justified in paying the bill from the fine and forfeiture fund. However, I think it would be proper for the county commissioners to be guided in this matter by the advice of you as their county attorney.

April 18, 1946.—046-164.

COUNTY EMPLOYEES—GROUP INSURANCE—COUNTY RETIREMENT ACT

QUESTION: Polk county carries group insurance in accordance with Chapter 20078, Laws of Florida, 1939. A former employee of the county, who is now receiving payments under the County Retirement Act passed in 1945, would like to continue to carry such group insurance if acceptable to the company who wrote same by personally paying the premiums on the said policy. By his paying such insurance on such group insurance policy, would he jeopardize the benefits which he receives and will receive under the so-called County Retirement Act?

To Honorable D. H. Sloan, Jr., Clerk and Auditor, Polk County, Bartow, Florida:

I am mindful of the fact of the fact that this so-called group insurance is stated in said Chapter 20078 to be in lieu of workmen's compensation benefits.

Section 5 of the provisions of the group insurance policy, which is written by The Travelers Insurance Company of Hartford, Connecticut, and insures the employees of Polk county, Florida, says:

"5. Termination of Insurance:—The Insurance of any Employee covered hereunder shall end when his employment with the Employer shall end except in a case where at the time of such termination the Employee shall be wholly disabled and prevented by bodily injury or disease from engaging in any occupation or employment for wage or profit. In such case the insurance will remain in force as to such Employee during the continuance of such disability for the period of three months from the date upon which the Employee ceased to work and thereafter during the continuance of such disability and while this policy shall remain in force until the Employer shall notify the Company to terminate the insurance as to such Employee. Nothing in this paragraph contained shall limit or extend the Permanent Total Disability Benefit to which an Employee shall become entitled under this policy.

Temporary lay-off or leave of absence for reasons other than physical disability as aforesaid shall not be considered as termination of employment for the purpose of this insurance unless the Employer shall so elect."

The waiver which the county contemplates executing according to the specimen sent us reads:

"We hereby elect that any employee pensioned due to retirement from active service for reasons other than physical disability shall not be considered as having terminated his employment for the purpose of this insurance until such time as his pension is terminated."

In the face of such a waiver by the employer I would not advise any former county employee now receiving the benefits of the retirement act to continue to pay premiums thereunder for it might jeopardize the benefits that he is receiving and should receive by virtue of the retirement act.

Section 14 of said act reads as follows:

"Section 14. Any person accepting or receiving the benefit of retirement compensation under this Act shall not be employed in any capacity by the State of Florida or any political subdivision, department, branch or agency thereof and any person accepting or enjoying the benefits of retirement compensation under this act who accepts such employment or receives any other compensation from the State of Florida or any political subdivision, department, branch or agency thereof for services rendered shall forfeit all the benefits of this act forever and the State Comptroller shall forthwith strike such person's name from the retirement compensation roll and refuse to honor any requisitions for retirement compensation made by such person."

This so-called waiver contemplates that an employee receiving the benefits of this retirement act shall not be considered as having terminated his employment; therefore, it must result that if such an employee has not terminated his employment, then he is still in the employ of the State of Florida and might be subject to the provisions of said Section 14. This might result in the employee losing both benefits, his group insurance and his retirement benefit.

January 28, 1946.—046-29.

RIGHT TO EMPLOY IMPOUNDING OFFICER IN HARDEE COUNTY

QUESTION: May the Hardee county commissioners employ an impounding officer to enforce the law prohibiting livestock from running at large, and pay him a salary of \$200.00 per month and expenses out of county funds?

To Honorable Wilbur W. Whitehurst, Attorney at Law, Wauchula, Florida:

Livestock is prohibited from running at large in Hardee county, Florida; compensation to the sheriff or any constable taking up and impounding the said cattle is based on a given amount for each animal impounded and a sum per day per animal for maintenance; animals so impounded and not redeemed can be sold. In case of redemption prior to sale, the owner pays the compensation and allowance, and, if not redeemed, the officer making the sale retains his fee and costs from the proceeds of the sale and turns the balance over to the clerk of the court.

As the law itself fixed the compensation of officers taking up and impounding said animals, this is the law which would govern and the county commissioners, in my opinion, have no authority to employ another person and pay him a salary and expenses out of county funds.

January 8, 1946.—046-8.

ELECTION—TERMS OF OFFICE

QUESTION: Under the provisions of amended Section 5, Article VIII, Florida Constitution, which of the offices of member of a board of county commissioners will be required to be filled by election in 1946?

To Honorable W. P. Tucker, Chairman, Board of County Commissioners, Brooksville, Florida:

Amended Section 5, Article VIII, Florida Constitution, proposed by the 1943 Legislature and adopted by the voters of Florida at the general election in 1944, provides that county commissioners shall hold office for four years; that the county commissioners elected from the even numbered districts in 1944 shall serve for two years, those elected in 1944 from the odd numbered districts shall hold office for four years, and thereafter the terms shall be for four years. Thus it appears that at the general election in 1944, county commissioners from districts numbered two and four were elected to two-year terms, and those from districts numbered one, three and five were elected to four-year terms.

In view of this constitutional provision, it appears the above question is properly answered as follows:

Only the county commissioners from the even numbered districts in the county, that is, from districts two and four, will be required to be elected in 1946, and when elected they shall serve for a period of four years. County commissioners from the odd numbered districts in the county, that is, from districts one, three and five, will not be required to be elected until 1948, and when elected they shall serve for a period of four years.

January 8, 1945.—045-6.

JUSTICES OF THE PEACE—OFFICE EXPENSES

QUESTION: Has the board of county commissioners the duty, or authority, to furnish to a justice of the peace office space, furniture, record books, seals, etc.?

To Honorable Carlyle Ausley, Clerk of the Circuit Court, Ocala, Florida:

I am unable to find any statutory authority in the county commissioners for supplying office space, furniture, fixtures, record books, or seals to a justice of the peace. I concur in the opinion of former Attorney General Landis, reported on page 625, Biennial Report of the Attorney General, 1931-1932, wherein he held that all such expenses were to be borne by the justice of the peace and paid out of his fees.

February 5, 1945.—045-31.

COUNTY FIRE CONTROL UNITS

QUESTIONS: 1. Does the wording in Section 125.29, 1943 Supplement to Florida Statutes, 1941 (being Section 3, Chapter 21997, Acts of 1943), with respect to establishing a county fire control unit, viz., "unless and until the terms thereof shall be ratified by an affirmative vote of a majority of the qualified electors at the election at which the question is submitted," refer to a majority of all votes cast at the general or special election at which such question is submitted, or to a majority of all votes cast with respect to such question?

2. Where soldiers' ballots of a county did not carry the referendum question as to whether a county fire control unit should be established, did such failure to print the question on the soldiers' ballots invalidate the referendum election with respect to the question submitted?

To Honorable H. J. Malsberger, State Forester, Florida Forest and Park Service:

The above Section 125.29 provides that before a county fire control unit shall be established and maintained by a board of county commissioners, the terms thereof shall be ratified by a "majority of the qualified electors of such county voting in the election at which the question is submitted"; that the submission of said question to a vote of the electors "may be at any special or general election now provided for by law, and the laws pertaining to and governing such special or general election shall govern the referendum election to be held on the establishment and maintenance of fire control units"; and that the result of such election shall be canvassed and returned "as general elections for the election of county officers are canvassed and returned."

The word "election" obviously is used in this law in a dual sense, viz., referring to general and special elections, on the one hand, and referring, on the other, to the referendum election to be held with respect to the question to be submitted.

In the absence of a judicial construction of this law, in my opinion the above questions are properly answered in the order stated, as follows:

1. The affirmative vote of a majority of the qualified electors voting at the general or special election at which the question is submitted is required; provided, that in the event the question so submitted is not included in the ballots of servicemen voted at such election, votes of such servicemen shall not be counted in determining the majority vote with respect to this question.

2. Reference is made to your letter of September 8, 1944, and my opinion in response thereto of September 9, 1944. Under the circumstances contemplated in such opinion, failure to include in soldiers' ballots the question with respect to county fire control units submitted at the last general election did not invalidate the vote on the question.

NEW COUNTIES

February 14, 1945.—045-42.

NEW COUNTY'S PART OF PARENT COUNTY'S INDEBTEDNESS

QUESTION: Where peremptory writ of mandamus requiring levy and collection of taxes by a new county to pay its pro rata part of the indebtedness of the parent county existing at the time of the creation of the new county has been affirmed by the supreme court, may the school boards of both counties compromise the amount payable to the parent county?

To Honorable Colin English, State Superintendent of Public Instruction:

It appears that by Chapter 11371, Acts of 1925, Gilchrist county was created out of a part of Alachua county. The boards of public instruction of the new county and the parent county met in compliance with the provisions of the constitution and Chapter 11371 for the purpose of determining the amount of the then existing debt of the parent county which should be paid by the new county. The computation was made without controversy and a small payment was made by the new county. Subsequent payments, as contemplated by the adjustment, were not made by Gilchrist county. Seventeen years later, the board of public instruction of Alachua county obtained a peremptory writ of mandamus for the assessment and collection of taxes by Gilchrist county to pay the amount due the parent county as previously determined. There was an appeal from the judgment granting the writ, and the judgment was affirmed. See Board of Public Instruction of Gilchrist County, et al., vs. Board of Public Instruction of Alachua County, et al., 19 So. (2nd) 576. It further appears that the boards of both counties wish to effect a compromise (or, more accurately, an accord and satisfaction), presumably by a reduction of the amount payable by Gilchrist county to Alachua county.

The only thing decided by the supreme court in the above cited case was that mandamus was a proper proceeding to force the new county to comply with its obligation, and the question of the amount payable was not directly questioned or determined in the proceeding.

Section 3, Article VIII, of the constitution, which covers the establishment of new counties, reads in part as follows:

"Every newly established county shall be held liable for its proportion of the then existing liabilities of the county or counties from which it shall be formed, rated upon the basis of the assessed value of the property, both real and personal, subject to taxation with in the territory taken from any county or counties, . . ."

As was pointed out by the supreme court, the constitutional provision sets up a formula for determination of the amount payable by the new county and requires nothing more than a mathematical computation, and that the only thing left for negotiation would be the time and manner of payment.

Ordinarily, a peremptory writ of mandamus is not amendable, but it appears that the lower court incorporated in the writ a provision which would permit certain readjustments upon proper application by the interested parties. I think that the boards may renegotiate as to the manner and time of payment and might even extend adjustment to include equitable considerations other than the amount payable under the constitutional formula, for example, a reduced rate of interest in the event the indebtedness existing at the time of the creation of the new county had been refunded in the meantime by the parent county at a lower rate, etc. But, in view of the fact that the constitution fixes a formula for computing the amount payable by the new county, it is my opinion that the school board of Alachua county would not have authority to accept a smaller sum—and more certainly not, in the absence of a determination that the new county is insolvent or unable to pay the fixed amount over a long period of time.

COUNTY BUDGET

June 28, 1946.—046-288.

RACING FUNDS—SCHOOL BOARD SHARE

QUESTION: Where the board of county commissioners formally adopted its budget without allotting to the school board any of the county funds received from racing taxes, and thereafter adopted a resolution making an allotment of \$16,500 from said fund to the school board, is such resolution valid and may the county commissioners now transfer that amount to the school board?

To Honorable J. Z. Walding, County Superintendent, Crestview, Florida:

Under two 1941 local acts, Chapters 20601 and 21035, one-half of the funds received by Okaloosa county from racing taxes became payable to the county school board and one-half to the county commissioners. In 1943 another local act, Chapter 22154, provided for deducting \$3,000 from such fund for a health unit, but if the health unit was not operated the unused portion of the \$3,000 should be divided equally between the county commissioners and the board of public instruction.

Early in the 1945 legislative session, on April 17, the School Foundation Act became a law. The purpose of that act is to supply additional state funds to the schools of those counties which cannot raise sufficient funds from taxes or otherwise to operate their schools. On April 23 there was introduced a local bill, the effect of which was to take away from the school board of Okaloosa county the racing tax money allotted to that board under the above local acts of 1941. This bill was passed and became Chapter 22680 of the laws of 1945.

The latter act allotted from the race track funds received by the county \$3,000 for a health unit, forty per cent of the remainder to county commissioners to build a jail and the other sixty per cent to the county commissioners generally.

Section 129.05, Cumulative Supplement, contains the following language in regard to the county expense budget:

"The adoption of said estimates by the said board shall give said estimates the force and effect of fixed appropriations, and the same shall not be altered or amended or exceeded, nor shall the expenses estimated under one head be paid out of the estimate for any other expense . . ."

Section 129.03 of the statutes prohibits transfer of money from one fund to another except on resolution approved by the comptroller but it excepts therefrom moneys received from racing taxes or licenses as well as the use of any such money. I do not have a copy of the budget but it is not likely that the county commissioners included the large sums they are receiving this year, from racing taxes, approximately \$100,000, and if not included there should be a substantial surplus from the racing funds. But even if the entire receipts from that source should have been budgeted it is my opinion that under Section 129.03 they not only may, but it is their duty to transfer to the school board the amount to which the latter board is entitled. The resolution to transfer \$16,500 to the school board does not satisfy that duty for the reasons set out below.

Chapter 22680 is a local act and it appears that no notice was published as required by Article III, Section 21 of the constitution, and therefore, is invalid. That chapter being invalid, chapters 20601 and 21035 of 1941 and chapter 22154 of 1943 are in force and division of the racing taxes must be made in accordance therewith. In view of the fact that the school board is asking state aid under the Foundation Act, and that chapter 22680 is unconstitutional, it is the duty of the school board to demand by mandamus or other legal action if necessary, its due portion of the Okaloosa county racing tax funds as allowed to the school board under the 1941 and 1943 special acts.

December 3, 1945.—045-361.

TRANSFER OF FUNDS

QUESTIONS: 1. May the county commissioners, at any time during the fiscal year, set up a county service officer fund, pursuant to Chapter 23017, Laws of Florida, Acts of 1945, and transfer to such fund, from other county funds, amounts sufficient to carry out the purposes of said Chapter 23017?

2. May the county commissioners, at any time during the fiscal year, amend the county budget by including therein a county service officer fund, after publishing the proposed amendment in the same manner as the original budget is required to be published, and then make transfers to such county service officer fund from other funds in the original budget?

To Honorable J. M. Lee, State Comptroller:

Chapter 23017 became effective on June 11, 1945, and provided for the employment of county service officers by the county. The act authorizes counties to levy a tax for the maintenance of the service officer or the county may "use available funds on hand and **unappropriated**, whether derived from taxation or otherwise." (Emphasis supplied). The present fiscal year of the counties commenced on the first day of October, 1945. As I understand from your request, there was no item included in the current county budget for a county service officer.

Under Chapter 129, Florida Statutes, 1941, county budgets are required and when one is adopted, it has the force and effect of an appropriation and the moneys appropriated for one expense cannot be used for the payment of any other. However, provision is made for transferring moneys from one fund to another, with the approval of the state comptroller, but this does not mean that additional items may be provided for by transfers. Only the items included in the original budget may be provided for.

Under Chapter 23017, only "available funds on hand and unappropriated" may be used for the payment of a county service officer where no tax is provided for that purpose.

From the above, we conclude that the county commissioners may, at any time during the fiscal year, set up a county service officer fund, pursuant to Chapter 23017, and transfer to such fund, from any "funds on hand and **unappropriated**" an amount sufficient to carry out the purposes of said chapter. In this connection, only funds on hand and unappropriated may be transferred to such county service officer fund. All funds described in the county budget and designated for use for any designated purpose are appropriated funds and cannot be used for the creation of a county service officer fund. This answers the first question.

The second question raises the question of the amendment or supplementation of a county budget after the same has become final. Although there is very little authority on this question, I am of the opinion that the county budget may be amended or supplemented by the addition of other items to the authorized expenditures where the new expenditure is some special or extraordinary one that could **not reasonably have been contemplated** when the budget was made and adopted. (State v. Sholtz, 119 Fla. 103, 160 So. 877; 1943-1944 Biennial Report, page 202; Whitney v. City of New Haven, 58 Conn. 450, 20 Atl. 666, text 668).

Section 129.05, Florida Statutes, 1941, requires that the county budget include all expenditures "contemplated or reasonably to be anticipated." This seems to recognize that there might be items which cannot be contemplated or anticipated when the budget is required to be made up.

In order to amend or supplement a county budget, the same procedure must be followed as is required in the adoption of the budget in the first instance. When an additional item is added to the budget by amendment or supplementation, it will be considered the same as if originally included therein and funds may be transferred to or from such item where an additional item is added by amendment or supplementation. After the tax rolls are made up and approved, no additional taxes should be provided to create funds for such item. This answers the second question.

June 8, 1946.—046-248.

SURPLUS FUNDS—SUPPLEMENTARY BUDGET

QUESTION: Can the surplus funds be used for proper county purposes and if used, what is the proper administrative procedure to be followed by the board in directing their use, and should any state officer be consulted to permit their use?

To Mr. James H. Millican, Jr., Attorney, County Board of Bond Trustees, Putnam County, Palatka, Florida:

Section 129.05, Florida Statutes Annotated, 1941, requires the adoption of a budget, and when adopted the estimates have the force and effect of fixed appropriation and cannot be altered, amended or exceeded. If there is an unexpended balance to the credit of any account at the end of each fiscal year, the same shall revert to the fund from which the appropriation was made.

This contemplates that any surplus so remaining shall be used to reduce taxes for the following year; thus giving the taxpayer a "break." This statement may seem strange in this day and time when it seems to be the idea of a great many boards and agencies to spend every cent that they can without taking any thought of tomorrow. Ordinarily, the budget should embrace sums for estimates of necessary and ordinary expenses and estimates for special and extraordinary expenses, and under ordinary circumstances this should be the limit of any expenditures of the tax money of the taxpayer.

However, I can well see that occasions may arise which could not be foreseen by the budget makers and where to hold surplus funds might cause a great loss to the county; therefore, it is my opinion, that if, as and when it is determined by your board or the county commissioners, in the counties where they fix the budget, that an emergency has arisen, and it is to the best interest of the county that the surplus funds be used to meet such emergency, then a supplemental budget might be set up, the proposed supplemental budget be advertised in the same manner as the regular annual budget, and that a meeting be held at an appointed time for the purpose of considering and adopting such supplemental budget; in other words, proceed exactly the same as if you were adopting your yearly budget. I am of the opinion that after the adoption of same, you can then use the money in accordance with the adopted supplemental budget.

October 25, 1946.—046-440.

TRANSFER OF FUNDS—EXCESS EXPENDITURES

QUESTION: Is it possible, where the general revenue fund of Volusia county, Florida, totals the sum of \$329,650.00 and contains 44 items, for the board of county commissioners of Volusia county, Florida, to let a contract for \$84,000 for repairs, alterations and additions to the Volusia county courthouse and jail, this amount being in excess of the total sum of items set up for this purpose, where there is a contingency item of \$11,345.10 and other items in the same fund which could be transferred by proper resolution approved by the comptroller to make up the amount necessary to meet the contract bid?

To Honorable Jess Mathas, Clerk of Circuit Court, Volusia County, DeLand, Florida:

Section 129.03, Florida Statutes, 1941, says:

"It is unlawful to transfer the money or any part thereof of one fund to another fund, or to pay from one fund the expenditures legally payable from another fund, except by resolution of the board of county commissioners, which said resolution must be approved by the state comptroller. In case of any question arising as to the proper fund from which any expenditure should be paid, the decision of the state comptroller shall govern . . ."

I do not attempt in this opinion to tell you what the comptroller will or will not do as this is a matter within his discretion.

Section 129.02, Florida Statutes, 1941, says:

"It is unlawful for the board of county commissioners to expend or contract for the expenditure in any year, October 1st to September 30th to be considered such year, more than ninety-five per cent of the estimated revenue of such year, ascertained and determined in accordance with Section 129.01, and ninety-five per cent of the taxes levied for the year unless more than ninety-five per cent should be collected, and any indebtedness contracted for any purpose against either of the funds enumerated in this chapter or for any purpose, the expenditure for which is properly chargeable to either of said funds, shall be null and void . . ."

The case of *Kirkland vs. State*, 97 So. 510, in my opinion, applies to an entire fund and not to items in a fund.

Therefore, it is my opinion, that, under the circumstances as set forth in your question, if the comptroller will approve the transfer of such items and such expenditures do not violate said Section 129.02, Florida Statutes, 1941, and from the statement of facts which you give me I do not see where such violation should occur. I answer your question in the affirmative.

COUNTY BUILDINGS; ERECTION, MAINTENANCE, LEASE, ETC.

August 14, 1945.—045-239.

ALACHUA COUNTY—REPAIRS OF JAIL AND COURTHOUSE

QUESTION: What is the interpretation of Section 135.01 and 135.02, Florida Statutes, 1941, in regard to repairs of the Alachua county jail and/or courthouse?

To Honorable T. D. Roland, Chairman, Board of County Commissioners, Alachua County, Newberry, Florida:

You state that the county commissioners of Alachua county deemed it necessary to repair the courthouse and/or jail and did give notice as required in Section 135.01, Florida Statutes, 1941, and that such question or questions would at a designated time be acted upon by said board. A meeting of the board was had pursuant to the said notice and the majority of the said board determined that such repairs were necessary. At said meeting the question was raised whether or not it was necessary, before a tax of 1½ mills per annum could be levied, that the said board have before it the plans and specifications for the said repairs.

I assume that the required notice was given as provided in said section and that all things required by said Section 135.01 were legally done. I do not see any law requiring the board to have before it the proposed plans and specifications of said proposed repairs before the levy of 1½ mills can be made.

I call your attention, however, to Section 135.02, Florida Statutes, 1941, as to the necessity of a written contract, etc., before such repairs can be made.

COMPENSATION OF COUNTY OFFICIALS

August 21, 1945.—045-253.

COUNTY JUDGE OF PINELLAS COUNTY—SALARY

QUESTIONS: 1. Is a county judge a county officer or a state officer?

2. Is the county judge of Pinellas county entitled to retain a salary of \$1800 as judge of the county court under Chapter 10073, Laws of 1925, in addition to the maximum compensation for county officials of \$7500, limited by Section 145.01, Florida Statutes, 1941?

To Honorable Bryan Willis, State Auditor:

Accompanying your request for an opinion is a brief and argument submitted by the St. Petersburg Bar Association contending that such official is a state officer, and that the second question requires an affirmative answer.

In an Advisory Opinion, reported in 13 Fla. 687, one of the questions submitted by the governor was: Who are county officers within the meaning of the Constitution? Separate opinions were written by Chief Justice Randall and Justice Westcott. Judge Randall said:

"When State officers are mentioned, we at once understand a reference to those officers whose duties and jurisdiction are not confined to the locality of a county; and we understand county and city officers to be those whose duties are confined to the territory of a county or city, and are local in their character."

"Mayors of cities, county judges, and justices of the peace, issue all their writs in the name of the State, and act 'in the name and by the authority of the State,' but I cannot admit that this makes them other than county or local officers. I conclude that a county officer is one which is usually provided in the organization of counties and county governments, whose duties pertain and are limited to the territory of a county and to the local and domestic concerns before mentioned." (Emphasis supplied).

Judge Westcott said:

"I have no doubt that where the constitution designates the party as a county officer, and his authority extends throughout the limits of the county, and his duties appertain to the county, he is a county officer. This is the case with the county treasurer, county surveyor, county commissioners and county judge." (Emphasis supplied).

"For the reasons stated, I concur in the conclusion reached by Chief Justice Randall, as to who are county officers."

The foregoing definition of county officers was approved in *County of Gadsden vs. Green*, 22 Fla. 102, and again in *State vs. Burns*, 21 So. 290. In the latter case, the court added:

"Whether an officer, unprovided for by the Constitution, but created solely by legislative enactment, is to be regarded as a state or county officer, within the meaning of the quoted clause of the Constitution, requiring his appointment by the governor or election by the people, must depend in large measure upon the territorial scope of his jurisdiction, and upon the nature and character of his powers and duties. If the jurisdiction for the exercise of his powers and duties is coextensive with the limits of the state, then he is a state officer. If confined, like a sheriff or county judge, within the limits of a county, but coextensive with the limits of such county, then he is a county officer." (Emphasis supplied).

In *State vs. Hocker*, 22 So. 721, the court, after defining a public officer, said:

"A state officer is one who falls within this definition, and whose field for the exercise of his jurisdiction, duties, and powers is coextensive with the limits of the state, and extends to every part of it."

That statement was quoted and approved in an Advisory Opinion reported in 1 So. (2d) 636.

It is argued that a county judge is a state officer because the provision of the constitution establishing the office of county judge is contained in the judiciary article of the constitution, Article V, Section 16; whereas, county officers generally are provided for in Article VIII, Section 6, and a county judge is not included in the latter. A sufficient answer to such argument is the fact that the judiciary section of the constitution, Article V, also provides for justices of the peace, constables, criminal courts of record, prosecuting attorneys, county courts, clerks of such courts, municipal courts, etc.; yet it would not be seriously contended that such officers or the judges of those courts are state officers. Our court has held that the county solicitor or prosecuting attorney of the criminal court is a county officer. See *State vs. Barnes*, 3 So. 433, and *Pelaez vs. State*, 144 So. 364.

In *Cates vs. Heffernan*, 18 So. (2d) 12, the court said:

"... a court established by the legislature under this constitutional power, though its jurisdiction may be limited to a single county, becomes a part of the judicial system of the State."

Under this, it is argued that a judge of any court is a state officer. But to say that a court is a part of the judicial system of the state is not the equivalent of a saying that the judge of such court is a state officer. Indeed, all county officers are, in a sense, officers of the state as a part of the machinery of the state's government in their respective counties, but that does not make them state officers. *Latour vs. Stone*, 190 So. 704, *Jackson vs. State*, 71 So. 332. And the fact that a county officer may perform certain functions for the state government and may receive compensation for such services does not divest him of the character of a county officer. Advisory Opinion, 13 Fla. 687.

It will be observed that in several instances our court has used the county judge as an illustration of a county officer, and applying the definition of a county officer as set out in the foregoing authorities, it will be observed that he comes clearly within that class. He has no jurisdiction beyond his county. His authority and duties extend only to the limits of his county. It might be added that he is elected by a county vote, his compensation is from county sources, and he is required to give a bond, the amount of which is fixed by the county commissioners.

If what has been said were insufficient reason for holding a county judge to be a county officer, further doubt would be removed by reference to Section 16, Article V, the constitutional provision for a county judge, which by its terms, at least indirectly, classifies a county judge as a county officer. It reads:

"There shall be in each county a county judge who shall be elected by the qualified electors of said county at the time and places of voting for **other county officers** and shall hold his office for four years. His compensation shall be provided for by law." (Emphasis supplied).

The answer to your first question is that a county judge is a county officer and not a state officer.

Chapter 10073, Laws of 1925, was an act to amend certain provisions of Chapter 8490, Acts 1921, and was an act to organize a county court in Pinellas county. Section 5 of the amended act is as follows:

"The county judge of Pinellas county shall be the judge of said court. He shall be deemed and held a separate and different official from the said county judge, and shall receive a salary of Eighteen Hundred (\$1800.00) dollars per year, payable monthly, upon warrant of the board of county commissioners of Pinellas county, Florida. This compensation shall exclude all other compensations which the said judge of the county court, as such, might receive or be entitled to."

Section 145.01, Florida Statutes, 1941, which limits the compensation of certain county officials to \$7500.00 per year, is, in part, as follows:

"Each county official whose compensation for his official duties is paid wholly or partly by fees or commissions, or fees and commissions, shall receive as his yearly compensation for his official services from the whole or a part of the fees, or commissions so collected, the following sum only; . . . provided that no such official shall under the foregoing computation of remuneration receive from the income so collected by him more than seven thousand five hundred dollars per year."

It is argued that the section of Chapter 10073 quoted above effectively removes the county judge of Pinellas county from the compensation limitation of Section 145.01 in that it says that the judge of the county court of Pinellas county shall be deemed and held a separate and different official from the county judge and that his compensation of \$1800.00 per year shall exclude all other compensations which he as such judge of the county court might receive or be entitled to.

The provision to the effect that the judge of the county court shall be deemed and held a separate and different official from the county judge added nothing whatever to the law. The same is true of every county judge who, under the law, is judge of the county court. Each of them is a separate official as county judge and as judge of the county court. The provision that his salary of \$1800.00 shall exclude all other compensations which as judge of the county court he might receive simply means that the salary as fixed is in lieu of the compensations he might be otherwise entitled to receive as judge of the county court.

Section 18 of Article V of the constitution, authorizing county courts, provides that "The county judge shall be the judge of said court." Section 15 of the same article makes provision for certain county officers, including the clerk of the circuit court, and reads, in part, as follows: "There shall be elected in each county . . . a clerk of the circuit court, who shall also be clerk . . . of the board of county commissioners . . ." The quoted provisions of Sections 18 and 15 of Article V are substantially identical. In two cases where the clerk of the circuit court received a

salary as clerk of the board of county commissioners, our court held that such salary must be included in the maximum compensation of county officers fixed by Section 145.01 at \$7500.00. *Orange County vs. Robinson*, 149 So. 604, and *Carlton vs. Fidelity and Deposit Co. of Maryland*, 151 So. 291. The same rule would necessarily apply to the salary which a county judge receives as judge of the county court.

Section 145.01 derived from Chapter 11954, Acts of 1927. That chapter and earlier laws on the same subject were attacked in *Flood vs. State*, 129 So. 861. In that case, our court discusses the history, policy and purpose of such legislation. The plaintiff in error contended that under the law he was not only clerk of the criminal court of record of Dade county, but also clerk of the civil court of record and clerk of the court of crimes in that county, and that he was entitled to the maximum compensation allowed under Chapter 11954, Acts of 1927 (Section 145.01, of the statutes), for performing the duties of each of said offices. The court disposed of this contention in the following language:

"... Section 15 of Article 16 of the Constitution provides that 'no person shall hold, or perform the functions of, more than one office under the government of this state at the same time.' If he cannot hold or perform the functions of more than one office at the time, it follows that he cannot collect compensation for more than one office for the like period. In addition to being contrary to public policy as thus expressed, this contention is concluded by the very terms of chapter 11954, Acts of 1927, which prescribes a maximum compensation for all county officers paid wholly or in part by fees and commissions, or both. The fact of his being constituted clerk of the civil court of record and clerk of the court of crimes of Dade county amounts merely to the imposition of extra duties on the plaintiff in error as clerk of the criminal court of record which the Legislature had a right to impose. *Whitaker v. Parsons*, 80 Fla. 352, 86 So. 247; *Amos et al. v. Mathews* (Fla.) 126 So. 308. None of these duties are inconsistent, and all fees and commissions collected by him in their performance should be reported as required by chapter 11954, Acts 1927."

It is my opinion that it is the duty of the county judge of Pinellas county to include in his report required by Section 145.03, Florida Statutes, 1941, the salary fixed for him as judge of the county court by Chapter 10073, and that no part of that salary may be lawfully retained by him if it would make his total compensation for all services, both as county judge and as judge of the county court, exceed \$7500.00.

COMPENSATION OF COUNTY OFFICIALS

January 23, 1946.—046-22.

LIABILITY FOR PETTY CASH SHORTAGE

QUESTION: Should a petty cash shortage in a county judge's office account be considered an expense of the office or a liability of the responsible officer?

To Honorable J. M. Lee, Comptroller:

In the audit of the former county judge of Duval county, Florida, there is shown additional excess income of \$360.26 due primarily to the inclusion of the cash shortage account of \$365.23 as an expense item in 1944. The former county judge contends that this \$365.23 is an accumulation of several years of what is known in the business world as "over and short" account. There is no charge against this former county judge of misfeasance or neglect of office, but I gather from the facts that the

money was received into his office but in making change or due to some other error the clerks and subordinates in the office of the former county judge erred to the extent of the said \$365.23.

You desire to know if such cash shortage could be included as an expense item of the office as provided by Section 145.02, Florida Statutes, 1941.

Whether a public official having custody of public money should be held responsible for the loss of such money has long troubled the courts of this country.

At common law the rule was that no personal liability of the public official existed except for personal misfeasance or neglect and that a public officer may not be held responsible for misconduct of his subordinates.

The modern decisions of our courts have, however, almost unanimously repudiated this doctrine because they say "that a sound public policy dictates the rule of strict liability in order to prevent frauds." *Byrd v. McGoldrick*, 116 A. L. R. 1059.

The Florida Supreme Court has not directly passed upon this question but it has held that an officer is responsible for money received by him which represents fees collected and can be made to answer for any surplus over and above expenses of his office and amounts allowed him by law (*Martin v. Karel, Sheriff*, 143 So. 317; *Orange County v. Robinson*, 149 So. 19).

I recognize that this rule of public policy will, in some instances, cause a hardship but I believe that it is a wise rule and should be the rule in Florida.

It is my opinion, therefore, this shortage cannot be considered as necessary expenditures for the proper operation of the county judge's office and should be collected from the said former county judge.

April 6, 1946.—046-135.

EMERGENCY FUND—TAX COLLECTOR—COMMISSIONS

QUESTIONS: Can \$25,000 of the emergency fund appropriated in Chapter 22827, Section 12, Laws of 1945, be used to supplement the \$75,000 appropriated under item 47, g, Expense of Collecting Revenue, when this amount is not sufficient to pay tax collectors' commissions for collecting license taxes?

Is the state required to pay such commissions to tax collectors when it is apparent their revenue will be more than the maximum allowed by law?

To Honorable Terry C. Lee, Budget Director:

Section 12 of the 1945 General Appropriations Act, Chapter 22827, provided an emergency appropriation of \$500,000 to be under the control and supervision of the State Budget Commission, and to be used in the event of an emergency or for the purpose of supplying additional funds for any state office, commission, department, board, bureau, institution or other agency of the state government when the appropriation made by the act should be found to be insufficient to pay the necessary cost of proper administration of the duties assigned to that state agency, or to pay its necessary expenses.

Section 1, Item 47, g, of the General Appropriations Act provided \$75,000 for the expense of collecting revenue. It appears that at this time the \$75,000 has been exhausted and there is now due by the state to various tax collectors \$12,147.16 as commissions for collecting state

revenue. The comptroller has requested transfer of \$25,000 from the emergency fund with which to pay these accumulated commissions and other such commissions as may accrue during the fiscal year.

It is my opinion that a transfer from the emergency fund in an amount sufficient to supply the present and anticipated deficiency of funds for payment of such tax collectors' commissions is clearly within the intent and purpose of Section 12 of the General Appropriations Act, and such a transfer for that purpose would be lawful.

Section 145.05 of the statutes provides for the disposition of excess fees of county officials and under that section such excess fees are used exclusively for county purposes. They are county funds. Accordingly, commissions payable by the state to tax collectors for collecting revenue must be paid, regardless of whether or not the tax collector will receive from fees net income above the maximum compensation to which he is entitled under Section 145.01.

November 29, 1946.—046-486.

COUNTY JUDGE—INCOME FROM OTHER COUNTY

QUESTION: Is the income received from another county by reason of executive assignment to such other county to be included in the report of income of the office to which county judge was elected?

To Honorable Orvil L. Dayton, Jr., County Judge, Pasco County, Dade City, Florida:

In my opinion, your question should be answered in the affirmative.

Section 145.01, Florida Statutes, 1941, sets forth what the yearly compensation shall be and refers to the net income from such office. There is no reference as to the source of such income. I do not think it matters whether a part of the income comes from one county and a part from another. I think that you are limited to a net income from whatever source obtained.

Your compensation for serving as judge of another county was because of your official position in your county. To hold otherwise would set at naught Sections 145.01 and 145.02, Florida Statutes, 1941.

November 2, 1946.—046-452.

STATE ORGANIZATION—MEMBERSHIP DUES

QUESTION: May dues which a supervisor of registration pays for membership in the Florida State Association of Supervisors of Registration be lawfully charged by the supervisor to the county and be paid from public funds?

To Honorable Lendell Sharer, Supervisor of Registration, Manatee County, Bradenton, Florida:

A study of our laws fails to evidence any statutes which authorize such dues to be considered and treated as a part of the general expense of the office of supervisor of registration chargeable to the county and payable from public funds of the county.

Since I am convinced that much good will inure to the supervisors of registration and to the general public from the state association of supervisors, I regret that in my opinion it would seem that the above question properly is answered in the negative.

November 6, 1946.—046-451.

EXPENSES—REFUND

QUESTION: Is the tax assessor entitled to reimbursement for postage from the county, said postage spent in connection with the expense of the tax assessor's office?

To Honorable Lonnie M. Pearce, Tax Assessor, Columbia County, Lake City, Florida:

As said by the Honorable Cary D. Landis in an opinion given January 21, 1935:

"A county assessor of taxes is entitled to charge as expense of operating his office whatever expenditures he may be required to make in the performance of the official duties of his office."

In my opinion, you are entitled to be reimbursed for postage spent by you in the performance of your official duties.

December 20, 1946.—046-528.

SUPERVISOR OF REGISTRATION—MILEAGE—VOTING MACHINES

QUESTION: Is a supervisor of registration entitled to mileage traveled in connection with official duties as custodian of voting machines?

To Honorable R. A. Gray, Secretary of State:

I know of no general law which authorizes the payment of mileage in connection with such duties and, hence, the question is answered in the negative.

COUNTY PUBLIC HEALTH UNITS

February 5, 1945.—045-24.

FUNDS PAYABLE FROM A MUNICIPALITY

QUESTION: In an instance wherein the city of Tampa agreed to reimburse the Hillsborough county health unit in the amount of \$50 per month for heat, lights, janitor service, etc., for several rooms reserved for use of the city physician in the building in Tampa occupied by such health unit, to whom is such amount properly payable by said city?

To Honorable J. Edwin Larson, State Treasurer:

Chapter 22323, Acts of 1943, combined and co-ordinated public health services in Hillsborough county, Florida, in the Hillsborough county health unit. A consideration of the entire act, particularly Sections 7 and 8 thereof, and Section 154.03, Florida Statutes, 1941, leads me to the conclusion that funds from all sources for the purposes and requirements of the Hillsborough county health unit are properly payable to the state treasurer and to constitute a part of the "full-time Hillsborough county health unit funds."

Hence, it is my opinion that the above question is properly answered as follows:

Such sum of \$50 per month is payable by the city of Tampa to the state treasurer for account of the state board of health and to constitute a part of the "full-time Hillsborough county health unit funds."

February 4, 1946.—046-44.

MERIT SYSTEM RULES—AMENDMENTS

QUESTION: Are the following proposed amendments to the merit system rules of Florida State Board of Health and Florida Crippled Children's Commission suitable for submission to the State Board of Health?

To Mr. Angus Laird, Merit System Supervisor, Gainesville, Florida:

These proposed amendments are as follows:

Article IV, Section 8a—to be amended to read as follows:

In grading the papers of, or otherwise determining the standing, status or rating of persons taking civil service, merit system, and other competitive examinations for public employment, whether under the civil service laws or merit system of this State or any municipality or county in this State, preference shall be given to all persons possessing honorable discharges from the Military Forces of the United States of America, and the widows of such persons, by awarding unto them ten points in addition to the rating earned by them, and by placing each person entitled to the benefits of this Act at the top or in the prior or preferential position on the list of eligibles having the same rating, provided, however, that the provisions of this Act shall not apply to any person who has not been a bona fide resident of this State for three or more years. (From Chapter 23,015, No. 501, Florida Statutes).

Article VII, Paragraph 2, to be amended to read as follows:

Appointments of subordinate personnel of local health units will be made by the Board of County Commissioners, or other local agency with legally delegated authority, upon recommendation of the unit director, and with the approval of the State Health Officer. The unit director shall be appointed by local authorities with the approval of the State Health Officer and of the State Board of Health.

Article XI, Section 2, Paragraphs 1 and 2, to be amended to read as follows:

Paragraph 1. The State Board of Health or County Health Unit, or the Crippled Children's Commission, fifteen days after notice in writing to an employee stating specific reason or reasons therefor, may dismiss any permanent employee who is negligent in his duties, or inefficient in his duties, or unfit to perform his duties, or who has been guilty of gross insubordination or misconduct. Dismissal of an employee who is convicted of any crime involving moral turpitude is final and such employees shall have no recourse to appeal to the Council.

Paragraph 2. The services of any non-permanent employee may be terminated at any time at the discretion of the appointing authorities.

Article XI, Section 6, to be amended to read as follows:

Paragraph 1. The tenure of office of every permanent employee shall be during good behavior and the satisfactory performance of his duties as recorded by his service rating. This provision, however, shall not be interpreted to prevent the separation of an employee for cause or age as provided in Paragraph 2 of this section, or the separation of an employee because of lack of funds or curtailment of work when made in accordance with this rule.

Paragraph 2. All employees shall retire automatically at the end of the fiscal year following their sixty-fifth birthday. In exceptional cases, the Board of Health or the Crippled Children's Commission may authorize the continued employment on a year-to-year basis of a person after reaching retirement age, but such a person may be dismissed or retired at any time at the discretion of the appointing authorities.

While you were here you stated that the wording in the above proposed amendment of Paragraph 1, Section 2, Article XI, "or who has been guilty of gross insubordination or misconduct," is intended to be "or who has been guilty of insubordination or gross misconduct"; and the proposed amendment of said Paragraph 1 is here accepted as changed to the extent noted.

I find nothing objectionable to any of such proposed amendments, except proposed amended Paragraph 2 of Article VII. The objection to this proposed amendment is based upon the apparent fact that its provisions collide with Section 154.04, Florida Statutes, 1941, which section is quoted, in part, as follows:

"The personnel of the minimum full-time local health unit shall consist of a director, who shall be a doctor of medicine, a public health nurse, a sanitary officer and a clerk. All of the members of such personnel shall be selected from those especially trained in public health administration and practice, so far as the same shall relate to the duties of their respective positions. They shall be employed by the board of county commissioners; provided, however, that no such personnel shall be employed by the board of county commissioners unless such said personnel shall be approved by the state health officer . . ."

While a great majority of the local county health units of Florida are governed by the above provision of our general law, it is recognized that in one or more counties, as result of law applicable particularly thereto, different provision may be made for the employment or appointment of the personnel of health units therein. (For example, Sections 4 and 5, Chapter 22323, Laws of Florida, Acts of 1943, applicable to Hillsborough county). Any rule must take notice of the requirements of law pertaining to this subject. It is suggested that, to avoid complications, the rule relating to such personnel should set forth the procedure to be followed in those counties under said Section 154.04, and the procedure to be followed in the county or counties under different provisions of law.

As stated, the procedure to be provided by the rule must not conflict with applicable law. Thus, it would appear that Paragraph 2, Section 1, Article VII, of the merit system rules, as adopted, and also the above proposed amendment thereof, conflict with said Section 154.04. To remedy this, the rule should provide that the personnel (including the director) of those health units in counties under said Section 154.04, shall be employed by the board of county commissioners of such respective counties, subject to approval by the state health officer. If, in connection with the employment of the subordinate personnel of such a health unit, the state health officer should see fit to consult the unit director or solicit the recommendation of the director, such action would not be unreasonable in view of the size of this state and the heavy duties of the state health officer; but to make such action mandatory by a rule would be to lodge authority in a unit director not authorized by law. Furthermore, to condition the appointment of any of the personnel of such a unit upon the required approval of the State Board of Health is an attempt to vest such board with authority not granted by law.

No attempt is here made to point out or discuss the laws applicable to the county or counties not governed by Section 154.04. It seems sufficient to suggest that in preparation of a rule of procedure for such county or counties the rule should set forth the method of employment or appointment of the health unit personnel found in the law affecting such county or counties.

COUNTY HOSPITALS

July 11, 1946.—046-298.

COUNTY APPROPRIATION FOR SUPPORT—LEGALITY

QUESTIONS: 1. Is it legal for the county commissioners of Madison county to appropriate one hundred thousand dollars for the building of a hospital, which appropriation would be prorated over a period of ten years?

2. Can the county commissioners of Madison county set up a millage each year for hospital purposes and include same in their budget?

To Honorable T. P. McLeod, Chairman, Board of County Commissioners, Madison County, Greenville, Florida:

Answering your first question, Section 155.04, Florida Statutes, 1941, provides for the establishment and maintenance of a public hospital by the county and the issuance of bonds therefor, and requires the same to be submitted to the freeholders.

Section 155.05, Florida Statutes, 1941, provides that if any county by reason of funds on hand, or donations or otherwise, is able to build and establish a public hospital without issuing bonds then the county commissioners may establish such hospital and without an election levy an annual tax for the maintenance thereof, such tax not to exceed five mills on the dollar, etc.

I know of no authority for the county commissioners to attempt to appropriate one hundred thousand dollars for the building of a hospital and prorate same over a period of ten years.

Answering your second question if, as and when you establish a public hospital as set forth in the above section, then you may levy an annual tax for the maintenance thereof provided it does not exceed the millage as allowed by law.

July 30, 1946.—046-326.

FINANCING—COUNTY OBLIGATION

QUESTION: Can a board of county commissioners obligate the county for the building of a hospital without an election of the freeholders, under the following circumstances?

To Honorable H. A. Rider, County Attorney, Hendry County, LaBelle, Florida:

At the regular meeting of the board of county commissioners of your county, held on April 2, 1946, the following business was transacted:

"Hon. Elbert L. Stewart, representative, appeared before the board with a request for some of the race track funds to be set aside for a hospital. Commissioner Miner stated that Mr. Clarence Bitting had agreed to donate \$25,000.00, and donate the land for the hospital, if constructed in Clewiston, provided the county and government would build a \$200,000 hospital. Motion by Evers, seconded by Waldron, that all over the \$22,000.00 guaranteed by the legislature from race track funds be deposited 40% to the hospital fund, 20% to the jail fund, and 40% for miscellaneous repairs and expenses. Motion carried."

Chapter 155, Florida Statutes, 1941, has given the counties the authority to establish and maintain public hospitals. If funds are not available for the building of the hospitals, bonds may be issued after an affirmative vote of the freeholders of said county. If funds are on hand, or donations or otherwise, the county has the power to establish such a hospital and without any election to levy a maintenance tax.

Sections 550.13 and 550.14, Florida Statutes, 1941, distribute the race track money among the several counties and provide that the county commissioners may determine "whether such moneys, or any part thereof, shall be converted into the county school fund or to some other lawfully authorized fund . . ."

In view of the above law, I think it is permissible for the county commissioners to deposit 40% of the said race track money, less the deduction suggested, to a hospital fund and it is not necessary that the freeholders authorize same.

However, I wish to call your attention to the fact that in my opinion the present board cannot by its action in the premises bind the action of any future board if the money is so placed in said fund. I would further call your attention to the provisions of Section 129.05, Florida Statutes, 1941, concerning the transfer of unexpended balances at the end of each fiscal year to the fund from which they were appropriated.

I am not unmindful of a recent ruling that I made to the board of county commissioners of Madison county concerning a proposed hospital for that county, but the facts in that case are entirely different from the facts in this case.

COUNTY OFFICERS AND EMPLOYEES' RETIREMENT SYSTEM

July 30, 1946.—046-328.

UNEXPENDED BALANCE—USE FOR ADMINISTRATION

QUESTION: May the unexpended and uncontracted for balance of the appropriation of \$20,000 provided by Section 11 of Chapter 22938, Laws of 1945 (Section 134.11, Cumulative Supplement), for administration expenses of the act for the first year be carried forward and expended in the second year?

To Honorable J. M. Lee, State Comptroller:

The part of the section covering your question reads as follows:

" . . . and there is hereby annually appropriated and shall be paid into the county officers and employees' retirement fund out of the intangible tax fund in the state treasury before the division and distribution to the counties, the amount necessary to administer efficiently the provisions of this act, not to exceed twenty thousand dollars during the first year after this act becomes effective and ten thousand dollars per annum thereafter."

The act became effective on July 1, 1945, and the first year of the administration of the act ended on June 30, 1946. Less than \$20,000 was expended or contracted for during the first year.

The act does not appropriate \$20,000 for administration expense during the first year. There was appropriated only so much of \$20,000 for the first year of administration as should be necessary to efficiently administer the act during the first year. The provision as to \$20,000 was merely a maximum limit.

Accordingly, there is no unexpended balance to be carried forward into the second year.

CHAPTER X

CITIES AND TOWNS

ORGANIZATION AND DISSOLUTION OF MUNICIPALITIES

October 11, 1946.—046-430.

CITY COMMISSION—VACANCY

STATEMENT: The town of LaBelle, which is operating under charter granted it by the legislature, being Chapter 11580, Acts of 1925, Extraordinary Session, has no provision therein for the filling of vacancies on the city commission. You desire to know what would be the best way for handling the situation wherein one of your commissioners, recently elected, has moved away from LaBelle and leaves a vacancy on the city commission.

To Honorable H. A. Rider, County Attorney, LaBelle, Florida:

Said Chapter 11580, Section 61, holds that the said city is invested with all the rights, powers and privileges of a municipal corporation under and by virtue of the general incorporation laws of the State of Florida. Section 165.13, Florida Statutes, 1941, says:

"The city or town council may establish rules and regulations . . . for the filling of all vacancies which may occur in the city or town government."

I would suggest that your city commission, acting under and by virtue of said Section 165.13, pass an ordinance providing for and setting forth the manner for filling vacancies on your city commission which occur because of death, resignation or removal from the city of members thereof.

POWERS OF MUNICIPALITIES

February 6, 1946.—046-47.

UTILITY SERVICE TAX AGAINST STATE

QUESTION: May municipalities of this state, pursuant to Chapter 22829, Laws of Florida, Acts of 1945, impose, levy and collect an excise tax against utility services purchased and used by the state and its agencies?

To Honorable J. M. Lee, State Comptroller:

Under Section 1, Chapter 22829, Laws of Florida, Acts of 1945, municipalities are authorized to impose, levy and collect, on purchases of public utility services, a tax in an amount not to exceed ten per cent of such purchases. "In every case the tax shall be collected from the purchaser of such utility service and paid by such purchaser." The tax is against the purchaser and not one against the seller.

In imposing, levying and collecting the said tax the municipality "may provide that federal, state . . . governments and their commissions and agencies . . . shall be exempted from the payment of the tax imposed and levied." (Section 1, Chapter 22829, Acts of 1945). There is no express direct authority for the municipality to levy such a tax against the state, its commissions and agencies other than the language above quoted. There is nothing in the title of the act indicating an intention to permit the levying of taxes against the state or any of its agencies.

The act, in so far as it relates to the state and its commissions and agencies, should receive a strict construction. (59 C. J. 1103 and 1131, Sections 653 and 670; 1 Bl. Com. 261; 1 Kent Com. 460; 3 Sutherland Statutory Construction, 3rd. Ed. 183, Section 6301; State v. Love, 99 Fla. 333, 126 So. 374, text 377). The statute, being a grant of power to municipalities, should receive a strict construction. (1 Dillon on Municipal Corporations, 5th. Ed. 452, Section 239). When we apply the rules of strict construction to the statute in question (50 Am. Jur. 404, Section 388), and the rule of implied exemption of the state from taxation, in the absence of a clear intent contained in the act (50 Am. Jur. 552, Section 560), we find no clearly expressed intent on the part of the legislature to permit the taxing of the state.

"Where a statute says a thing 'may' be done by a public official which is for the public benefit, it is to be construed that it must be done." (Seaboard Air Line Railway Company v. Wells, 100 Fla. 1027, 130 So. 587, text 593). "A mandatory construction will usually be given the word 'may' where public interests are concerned, and the public or third persons have a claim de jure that the power conferred should be exercised." (59 C. J. 1082, Section 635).

In the light of the above mentioned authorities and the fact that the statute in question gives to the municipalities no express power to levy taxes against the state and its agencies, the power conferred being merely that the municipality "may" declare that the state and its agencies "shall" be exempted from the payment of such taxes, I am of the opinion that the statute in question should not be construed as giving the municipalities power to levy taxes on public utilities used by the state and its agencies.

It may be that where a statute is intended to bind the state, the title of the act should give notice that the act contains such a provision, as acts do not usually bind the state as it does other persons.

I am, therefore, of the opinion that the above question should be answered in the negative, and that, the right of the municipality being uncertain, no such tax payments should be made by the state or its agencies until directed to do so by rule of some court of competent jurisdiction.

February 28, 1946.—046-82.

INCORPORATION—EFFECT ON HOMESTEADS

QUESTION: When the corporate limits of the city of Ocala, Florida, were extended by Chapter 23430, Laws of Florida, Acts of 1945, did this extension of the corporate limits reduce the area of existing homesteads, within the extended limits, to not more than one-half acre of land?

To Honorable H. C. Sistrunk, City Clerk and Tax Assessor, Ocala, Florida:

Under Section 7, Article X, Florida Constitution, homesteads to the value of five thousand dollars are exempted from taxation. The area of this homestead is the same as that "defined in article X, section 1, of the constitution." Under said Section 1, Article X, of the Florida Constitution homesteads "to the extent of one hundred and sixty acres of land, or the half of one acre within the limits of any incorporated city or town" are allowed. Under Section 5, Article X, "no homestead provided for in section one shall be reduced in area on account of its being subsequently included within the limits of an incorporated city or town, without the consent of the owner."

Where homesteads of more than one-half acre of land existed prior to the extension of the corporate limits of the city of Ocala, Florida, by Chapter 23430, Laws of Florida, Acts of 1945, these homesteads were not

reduced to one-half acre by the inclusion of them into the city limits, unless the extension of the city limits was with the consent of the owner, as Section 5, Article X, of the constitution, above mentioned, prohibits their reduction "without the consent of the owner," to the extension of the city limits.

This opinion should be considered as unofficial; because it is not rendered to some state official, board, commission or agency, or upon some question affecting the interests of the state.

POLICE POWER OF MUNICIPALITIES

July 18, 1946.—046-307.

CITY POLICEMAN—SERVICE OF WARRANT

QUESTION: Can a warrant issued by the municipal court of the city of Miami be lawfully served in Dade county, outside of the Miami city limits, by a Miami city policeman?

To Honorable Jimmie Sullivan, Sheriff of Dade County, Miami, Florida:

The answer to this question is contained in Section 168.03, Florida Statutes, 1941, which reads as follows:

"168.03 Process of municipal court; by whom executed.—The process of the mayor's court, or other municipal courts, of the cities and towns within the State of Florida shall extend to and may be served anywhere within the territorial limits of the county in which said city or town, is located, and all summons, subpoenas, warrants and other process of the mayor's court, or other municipal courts, may be served and executed by the city, or town marshal, his deputies, or other executive officer of such courts, anywhere within the territorial limits of the county within which the court issuing the same is located."

Said statute specifically provides that warrants of municipal courts may be served by the city marshal, his deputies, or other executive officers of such municipal courts anywhere within the territorial limits of the county within which the municipal court is located. Therefore, any policeman who is an executive officer of the municipal court of Miami may serve such a warrant anywhere in Dade county.

MAPS AND PLATS

September 27, 1946.—046-407.

COUNTY ROADS—HOW CREATED

QUESTION: Does the approval of a subdivision plat by a board of county commissioners in Florida make of the streets shown on said plat county roads upon which county road funds may legally be spent, or is it necessary that such streets be first made county roads by petition of interested citizens, advertisement by said board of county commissioners and action taken after a public hearing as in the case of establishment of other county roads?

To Mr. T. C. McCoy, Chairman, Board of County Commissioners, Escambia County, Pensacola, Florida:

I think your question is answered by Section 177.10, Florida Statutes, 1941, which reads as follows:

"Before said map or plat shall be presented to the county clerk for record, the owner or owners shall cause to be placed thereon a certificate of approval by the county commissioners, town board, or council, or the board of commissioners (in mu-

municipalities having a commission form of government) or their accredited representatives, having jurisdiction over the land described in the said map or plat; however, such approval shall not bind the county commissioners, town board, city council or board of commissioners to open up and keep in repair any parcels dedicated to the public in any map or plat so offered, but they may exercise such right at any time."

You will observe that the approval of the plat does not obligate the county board to keep up or maintain the streets or roads in the plat even though dedicated to the public, but they have a right to do so if they so decide. It is not necessary under such circumstances that petition, advertisement, etc., required by the statutes for establishing county roads be followed. In other words, when a plat covering an area outside of a city or town has been approved, filed, etc., as required by the statutes, the county board, without any further formality, may expend county money on such of the streets therein dedicated to the public as they find necessary for the public convenience.

November 14, 1946.—046-465.

RESURVEY OF PROPERTY—RECORDING

QUESTION: The board of county commissioners has caused to be made a resurvey of a platted subdivision in your county. They did this at the request of the foreman of the jury which had tried a case wherein property in a certain subdivision was in litigation. Do the county commissioners have the authority to make a resurvey of the property and do I have to record the plat even though it further confuses the issues?

To Honorable Jess Mathas, Clerk of Circuit Court, Volusia County, DeLand, Florida:

Section 177.02, Florida Statutes, 1941, in discussing the platting of land contemplates that the proprietor or proprietors shall cause the survey and may to be made. Section 177.10 contemplates that the owner or owners of the land shall cause to be placed thereon a certificate of approval by the county commissioners, etc. The entire chapter seems to refer to the owners of the land and to no others.

I find no authority of the county commissioners to make a resurvey of someone else's property and, therefore, I do not think that you will have the authority to record same.

POLICE OFFICERS' INSURANCE AND ANNUITIES

February 6, 1945.—045-26.

INSURANCE AND ANNUITY FUND

QUESTION: Can the board of commissioners of the police officers' insurance and annuity fund return to the individual officers now participating under the act, the moneys in full that have been contributed by them, with the understanding that the functioning of the act, in so far as benefits are concerned, will be held in abeyance until after the war is over, by reason of so many officers now serving in the armed forces, it being understood that those who have contributed, upon their return, may regain their seniority and status under the act, by repaying a like amount back into the fund when a resumption of activities is warranted?

To Mr. W. H. Robinton, Secretary, Board of Commissioners of the Police Officers' Insurance Fund, Gainesville, Florida:

The above subject is covered by Section 182.18, Florida Statutes Annotated, 1941, and provides as follows:

"182.18 Reimbursement of funds paid in.—The board of commissioners is authorized and empowered in its discretion, upon a finding that any police officer who has contributed to the retirement fund herein provided for has been discharged from the service or retired from the service through no fault of his own, to reimburse from the fund herein created an amount not to exceed that which such officer has contributed to the fund from the percentage of his monthly salary, and shall be no longer a participant in said fund."

It is my opinion that the board would have the right, under this statute, to make the refund in an amount not to exceed that which such officer has contributed to the fund from the percentage of his monthly salary, provided the officer contributing to said fund is agreeable to the refund. This act did not contemplate a national emergency, at the time of its enactment, and is silent on the subject of reinstatement under certain conditions, even though Section 115.15, Florida Statutes, 1941, reads as follows:

"Adoption of federal law for employees.—The provisions of section 8 of chapter 720 Acts of Congress of the United States, approved September 16, 1940 (Title 50 App. Section 308, U.S.C.A.), insofar as it relates to the re-employment of public employees granted a leave of absence on active military duty under this law, shall be applicable in this state and the refusal of any state, county, or municipal official to comply therewith shall subject him to removal from office . . ."

I am of the opinion that it will take an act of the legislature to complete the full thought of your inquiry.



CHAPTER XI

TAXATION AND FINANCE

GENERAL TAXATION PROVISIONS

March 15, 1946.—046-114.

MURPHY LAND—PREFERENCE

QUESTION: Is there any superiority among the various groups who may, under the provisions of Chapter 21684, 1943 (Section 192.38, Florida Statutes, 1941), acquire Murphy Act lands?

To Honorable F. C. Elliot, Secretary, Trustees of the Internal Improvement Fund:

I do not find in Chapter 21684 that any one of the several classes of applicants, who may apply for this type of land, may be given a preference over any other class of applicants, and it is my belief that, in the situation recited in your letter, the individual is entitled to a deed who under paragraph (1) (a) of the act became the successful bidder at a regular Murphy Act sale, although later a municipality made application under paragraph (1) (b) for the same land. The municipality, under Chapter 21684, has no higher rank or precedence which would justify the trustees in rejecting the bid of the individual and conveying the property to the municipality which is the subsequent applicant.

It is my opinion that these lands should be conveyed pursuant to Chapter 21684 to the first applicant who meets all the requirements of the law.

October 9, 1945.—045-315.

MURPHY LANDS—MUNICIPAL TAX LIENS, RIGHTS OF HOLDERS

QUESTION: What rights and interests, if any, do private holders of municipal tax liens have after the county proceeds to quiet its title by decree of court pursuant to Section 194.47, Florida Statutes, 1941, as amended?

To Honorable J. M. Lee, State Comptroller:

Since 1925 the tax liens for state, county and municipal taxes, as distinguished from special assessments, have been on equal footing and of equal dignity. (Chapters 10040, 14752, 17442, 20722 and 22079, Acts of 1925, 1929, 1935, 1941 and 1943; *City of Sanford v. Dial*, 104 Fla. 1, 142 So. 233; *Poekel v. Dowling*, 108 Fla. 582, 146 So. 662; *City of Tampa v. Barbee*, 115 Fla. 46, 155 So. 751). For the purpose of this opinion it will be presumed that the municipal tax lien in question arose subsequent to the effective date of Chapter 10040, Acts of 1925. If prior municipal tax liens should be brought in question they should be presented by a separate request for opinion, as a different rule may apply.

Generally where a person acquires a tax lien the laws under which it was issued, together with the lien itself, constitute a contract that is protected by the contract clauses of the state and federal constitutions. (*Pinellas County v. Banks*, 154 Fla. 582, 19 So. 2d. 1, text 3; *Starks v. Sawyer*, 56 Fla. 596, 47 So. 513). The same rule would seem to apply to municipal tax liens as well as to state and county tax liens. There would seem to be no distinction between state and county and municipal tax liens, issued since 1925, in this connection.

The supreme court, in the Pinellas County v. Banks case, *supra*, held that individual holders of state and county tax sale certificates have the following rights: (1) They may pay all subsequent county taxes, at any time prior to the vesting of title in the county, and foreclose their tax liens; (2) they may acquire the county's tax liens upon which it predicates a suit under Section 194.47, Florida Statutes, 1941, as amended; or (3) they may become parties defendant to the county's suit, in which case they will be relegated to their right to participate ratably with other lien holders in the proceeds of any sale by the county commissioners pursuant to said Section 194.47. "We are of the view that the rule herein may be applied to individual holders of municipal tax liens where issued and governed by like principles." (See Pinellas County v. Banks, *supra*, So. text 4).

When the county proceeds to quiet its title, under Section 194.47, Florida Statutes, 1941, as amended, the proceeding is one in rem against the lands as defendant and "it shall not be necessary to name as defendant in such bill of complaint, or proceeding, any person or persons owning or having any interest in or lien upon such lands." At the time of the filing of the bill of complaint the clerk issues a notice "directed in general terms to all persons, firms or corporations having any interest in or lien upon any of the lands" in the suit. Individual holders of municipal tax liens against the property would seem to become parties defendant to the same extent as would individual holders of state and county tax liens and would be bound by the proceeding to the same extent as such state and county lien holders.

I am, therefore, of the opinion that private holders of municipal tax liens have the same rights and interests as do private holders of state and county tax liens, after the county has quieted its title by decree of court pursuant to Section 194.47, Florida Statutes, 1941, as amended. These rights and interests seem to have been set out in Pinellas County v. Banks, *supra*, where it was said that they may participate in the proceeds of sale of the lands by the county commissioners.

April 17, 1945.—045-88

MURPHY LANDS—LEASE OF OIL AND GAS RIGHTS

QUESTION: May the Trustees of the Internal Improvement Fund lease the oil and gas rights on Murphy lands?

To Honorable F. C. Elliot, Secretary, Trustees of the Internal Improvement Fund:

Murphy lands in this opinion are those lands the State of Florida acquired under and by virtue of Chapter 18296, Laws of Florida, Acts of 1937, commonly known as the Murphy Act.

This act was last amended by the Session Laws of 1943, which is now Section 192.38, Florida Statutes, 1941. Under this said Section 192.38, the fee simple title to all lands acquired by the so-called Murphy Act became vested in the State of Florida.

The Trustees of the Internal Improvement Fund might (a) sell the land under certain conditions, (b) sell or lease the lands to the United States, (c) convey to any agency of the State of Florida or county: (1) easements for right of way, (2) any tract or parcel, (d) withdraw such lands from sale and dedicate land to public use, (e) exchange lands for other lands, (f) convey easements to railroad companies and light and power companies and are given the authority to administer, manage, control and supervise said lands.

Nowhere do we find any law giving the said trustees the right and authority to lease the said lands for oil and gas purposes.

Section 270.28, Florida Statutes, 1941, refers only to the lands owned by the Trustees of the Internal Improvement Fund of Florida and the Board of Commissioners of State Institutions and the State Board of Education of Florida, and does not refer to lands the title to which is held by the state.

All former opinions rendered on this question by this office are void.

October 23, 1945.—045-339.

TITLE TO LANDS VESTED IN THE STATE

QUESTION: Can the city of St. Petersburg legally levy taxes against lands which reverted to the State of Florida under the so-called Murphy Act for the years during which the title to such lands was vested in the state?

To Honorable C. Irving Carey, City Attorney, St. Petersburg, Florida:

Where the title to lands reverted to the State of Florida by virtue of the so-called Murphy Act (more specifically, Section 9 of Chapter 18296, Laws of Florida, Acts of 1937) the state became the owner of such lands, and municipal taxes cannot be levied legally against property held and owned by the State of Florida. See Section 192.06, Florida Statutes, 1941, and the amendment of such section in the 1943 Supplement to Volume I of such statutes.

Therefore, it is my opinion that your question is answered properly in the negative.

February 12, 1945.—045-35.

MURPHY LANDS—PURCHASE BY MUNICIPALITY

QUESTION: May a deed of Murphy land to a municipality, the consideration therefor being 25 per cent of the 1932 valuation, be revoked and the former consideration be used by the municipality for purchasing the same and additional property at the rate of \$1.00 per parcel, as provided in Chapter 20424, Acts of 1941?

To Honorable F. C. Elliot, Secretary, Trustees of the Internal Improvement Fund:

The City of Fort Meade contemplated the purchase of certain Murphy Act lands under Chapter 20424, Acts of 1941. However, through confusion, application for some of this property was made under the rules and regulations of the trustees providing for the sale of lands under Chapter 18296, Acts of 1937. There was received by the trustees for this particular land 25 per cent of the 1932 valuation, a sum somewhat in excess of the \$1.00 per parcel rate allowed under the 1941 statute.

To accomplish the now expressed desired of the city, to have the trustees withdraw or recall this deed and have all the property they wish conveyed to them under the 1941 act, will necessarily involve a determination by the trustees (1) that the conveyance and transaction involving the single piece was in error and, (2) that the amount received for it by the trustees in November, 1944, was paid into the state treasury in error. (Chapter 22008, Acts of 1943).

If it is found that such conveyance was erroneous the city of Fort Meade may reconvey to the State of Florida the land deeded to it. The trustees may then, by another conveyance, deed, in one instrument, all of the land to the municipality under the 1941 law.

If it is found that the former transaction was without error, then it would seem that the present conveyance must remain effective and the municipality must be requested to furnish an amount of money which would equal \$1.00 per parcel for the remaining land it wishes and this land could be conveyed under the provisions of the 1941 statute.

February 12, 1945.—045-36.

MURPHY LANDS—ADVERTISEMENT AND SALE

QUESTIONS: 1. In advertisement of the sale of Murphy Act land is it permissible to name the aggregate lots in a block, instead of repeating the descriptions in the tax certificates?

2. May all of the property be offered for sale at once for one bid, rather than each item separately?

3. May the required notice, by registered letter, to the former owner, be waived?

To Honorable F. C. Elliot, Secretary, Trustees of the Internal Improvement Fund:

With reference to the first inquiry, it would seem that the certificates, which caused this property to revert to the state, need not be mentioned in the advertisement, and it is my suggestion that the notice read, for example, "Lots 1, 2, 3, 4, Block 10; Lots 7, 8, Block 22," etc.

As to the second question, it is usually more advisable to sell real property in parcels or lots, rather than en masse, however, the matter of selling in this respect should be determined by the clerk in the exercise of his sound discretion. Circumstances may exist which render it altogether impracticable to realize the best price from separate sales and which, therefore, make it for the interest of the state that the sale should be in bulk. The clerk ordinarily may offer the property in separate tracts or lots, and bid as a whole and accept the latter bid if greater than the total of the bids upon the separate tracts. The facts of each particular case must be considered and that mode adopted which seems best calculated to bring the largest return.

The last inquiry refers to whether a certain rule and regulation adopted by the trustees pursuant to Section 9, Chapter 18296, Acts of 1937, may be waived. This rule requires notice, by registered letter, to the former owner or person last paying taxes, or lienholder of record, or to whom said lands were last assessed, and the waiver is sought by the clerk of the circuit court for the reason that "most of these lots have been delinquent for over 25 years." Rules and regulations fixed and adopted conformable to the powers delegated to the trustees have the force and effect of law and such enactments, it might be said, are laws or statutes of the state. Administrative regulations are binding on a person subject to them, without notice, and the courts will take judicial notice of them. Like legislative enactments, administrative enactments cannot be waived but may only be followed, repealed or amended. It is my belief, accordingly, that the clerk may not waive this notice, but must, where possible, send the notice to one of the persons named above.

May 21, 1945.—045-115.

MURPHY LANDS—TAX CERTIFICATES; DESCRIPTION

QUESTION: Is the description sufficient in a tax certificate to vest title in the state under the Murphy Act where lots are mistakenly placed in the adjoining block, although the lots are the only ones of those numbers in the entire subdivision?

To Honorable F. C. Elliot, Secretary, Trustees of the Internal Improvement Fund:

The property is located in a subdivision known as "A" Improvement Company. There are 660 lots in the tract and they are numbered consecutively from 1 to 660. The subdivision is again divided into blocks numbered from 1 to 118, each block containing a portion or series of the consecutively numbered lots; for example, block 95 embraces lots 521 to 526, block 96 embraces lots 527 to 532. The problem before us concerns this description: "Block 100, Lots 559, 560." Block 100 is erroneous, as a reference to the recorded plat will show that when the consecutively numbered lots reach these numbers, they are in Block 101.

Our court has recently (*Mitchell v. Moore*, 13 So. 2d. 314) recognized the circumstance that it had departed from the rule laid down in earlier decisions, to the effect that a greater degree of strictness should be observed in passing upon the sufficiency of descriptions in tax deeds than in ordinary deeds inter partes, and stated it was of the opinion the departure was justified. It was added that the court should not place a strained construction upon a description in a tax deed where, by applying the rules of law relating to descriptions in ordinary deeds, it was clear that the description was one by which the identity of the land could be established.

While here the lots are placed in the adjoining block, the description is complete enough for the certificate to be valid because, even without the block number being added, any lot in the subdivision could easily be located, they being numbered from 1 to 660. No two lots on the plat bear the same number, and this fact causes this description to come under the rule that a description in an assessment roll is adequate which makes it possible for a surveyor, with the aid of the whole tax roll and the information conveyed thereby, to identify the property with reasonable accuracy. Further, the attached file indicates that the taxes were not paid on lots 559, 560, block 101, for the year represented in the tax certificate.

The language, numerals and abbreviations in any description should be construed with the view of making the conveyance effectual and the above description, though not certain in itself, is capable of being made certain by an examination of the plat of the subdivision.

My view is that the description was sufficient to enable one to find the property on the plat and that the property described in the certificate passed to the state pursuant to the Murphy Act.

June 8, 1945.—045-139.

TAX SALE CERTIFICATES AND TAX DEEDS

QUESTIONS: 1. May an owner of a 1926 tax sale certificate be issued a tax deed upon land that vested in the state under Chapter 18296, 1937, and was subsequently conveyed by the trustees?

2. Does purchase of certificates in accordance with terms of Chapter 18296, 1937, cancel individually-held prior certificates?

To Honorable F. C. Elliot, Secretary, Trustees of the Internal Improvement Fund:

With reference to the first question, it appears that certain property vested in the state pursuant to the terms of the Murphy Act and later the trustees conveyed this land after usual sale held by the clerk of the circuit court; that an individual holds a certificate of the sale of 1926 and he states that if it is not redeemed he will apply for a tax deed.

This situation is similar in many respects to that obtaining in the case of *Ivey v. State*, 3 So. 2d. 345 (1941). There a tax deed was sought by an individual holder of certificates issued in 1932 and 1933, the title to the land having vested in the state under a certificate of the sale of 1934. The court, in observing that the individual holder had not, prior to the expiration of the period of redemption June 9, 1939, complied with the several terms and conditions necessary to obtain a tax deed, said that the effect of the Murphy Act was to require the owners of all state and county tax sale certificates which were more than two years old when the Murphy Act became effective June 9, 1937, to apply for tax deeds on such certificates before the lands covered by the certificates became absolutely vested in the state under the Murphy Act on June 9, 1939.

It is seen, therefore, that the right of the individual holder of tax certificates to apply for a tax deed has expired.

The second inquiry is of a somewhat general nature. Without having more definite information before me, you are advised that the case of *Tillet v. House*, 183 So. 827 (1938), dealt with a situation where a 1928 certificate was held by an individual, and the owner of the land subsequently purchased under the Murphy Act a 1926 certificate in an effort to defeat the lien of the 1928 certificate. The court held that the Murphy Act had no application to liens for taxes evidenced by tax certificates held by others than the state and that when the owner acquired the 1926 certificate under the said act the rights of the holder of the 1928 certificate were unaffected.

The second question is answered in the negative.

June 10, 1946.—046-251.

MURPHY LAW—MUNICIPAL TAXES

QUESTION: A piece of property reverted to the State of Florida by virtue of the Murphy Law in 1940 and the state held title to same from the period of 1940 to 1945, and was thereafter disposed of. What is the propriety of a city's tax against this property during the time that the state held the title?

To Honorable Jess Mathas, Clerk of Circuit Court, Volusia County, DeLand, Florida:

I assume that the city made no attempt to adjudicate its title (*Smith v. City of Arcadia*, 2 So. 2d. 725).

On March 13, 1941, I rendered an opinion in which I held that no city taxes could be assessed on property which had reverted to the state under the Murphy Law while the state held the title to such property.

City taxes assessed against the property prior to the state's obtaining title under the said Murphy Law remain liens against the property.

"Municipal tax sale certificates and tax liens legally existing on land covered by state tax sale certificates are not affected by this section vesting title to such lands in state without right of redemption, whereby state and municipal tax liens are of equal dignity, municipal tax liens and unpaid taxes are not included in state tax sale certificates, and municipal tax sale certificates are not terminated by this section. *Bice v. Haines City*, 142 Fla. 371, 195 So. 919." (Section 192.38, Florida Statutes, 1941).

After the state has sold its property the city can then assess municipal taxes against the same.

November 26, 1946.—046-490.

MURPHY ACT—CITY PROPERTY—TITLE

QUESTIONS: 1. Did title to certain property vest in the State of Florida by virtue of the Murphy Act based on the 1932 tax certificate?

2. Did Section 2 of Chapter 21420, Laws of Florida, Acts of 1941, have any effect in this instance?

To Trustees of the Internal Improvement Fund:

It appears that the city of New Smyrna Beach acquired the property in question in 1932, at which time there was a tax lien and tax certificate of 1932 outstanding on the property, and that in November, 1946, the clerk of the circuit court of Volusia county advertised the property for sale under the Murphy Act, at which time James B. Felmet was the successful bidder. The city of New Smyrna then protested the sale.

Further, it appears, and I am assuming, that there is no question but what this property was exempt from taxation under Section 192.06, Florida Statutes, 1941 from and after the date of its acquisition by the city of New Smyrna Beach.

The first question is answered in the negative.

I am of the opinion that the tax certificate in question falls within the provisions of the Futch Law as amended (Chapter 16252, Acts of 1933 as amended by Chapter 17400, Acts of 1935) inasmuch as the property was exempt from taxation for the years 1934, 1935, 1936, 1937 and 1938, and such exemption has the same effect as though taxes had been assessed and paid for those years. On this premise the title to the property would not have vested in the state by virtue of the Murphy Act.

Question two is answered in the affirmative.

Since the title to the property did not vest in the state, the tax certificate was cancelled by either Chapter 21420, Acts of 1941, or Chapter 20981, Acts of 1941, or both.

December 5, 1946.—046-491.

SUPPLEMENTAL OPINION TO 046-490

To the Trustees of the Internal Improvement Fund:

Supplementing opinion from this office dated November 26, 1946, dealing with above subject, it now appears from additional information received from clerk of circuit court of Volusia county that the assumption made in the above mentioned letter was not in accord with the facts.

The clerk of circuit court of Volusia county has advised that the property in question was assessed to the city of New Smyrna Beach from the year 1934 to 1939, inclusive, but that the property was exempt on the tax rolls only for the years 1933, 1934 and 1935.

On this basis, the property did not come within the provisions of the Futch Law as amended, and it is my opinion that the title therefore passed to the state by virtue of the Murphy Act.

Further, it is my opinion that such being the case, Chapter 21420, Special Acts of 1941, has no effect whatsoever on the property in question since the title had been vested in the State of Florida prior to the passage of said act, and that the lien for taxes, as evidenced by tax certificates had merged in such fee simple title.

June 12, 1946.—046-257.

MURPHY ACT LAND—PUBLIC USE

QUESTION: In what manner may a county school board acquire Murphy Act lands?

To Honorable Colin English, State Superintendent of Public Instruction:

You are advised that there are three ways in which this may be accomplished:

(1) The Trustees of the Internal Improvement Fund may withdraw a tract or parcel from public sale and dedicate the same to a public use considered necessary and proper by said trustees, pursuant to paragraph (1) (d), Section 192.38, Florida Statutes, 1941, as held in an opinion of this office July 14, 1945, to Honorable F. C. Elliot, Secretary and Engineer, Trustees of the Internal Improvement Fund, and under which the trustees have made such dedications to county school boards.

(2) The county board may apply to the proper clerk of the circuit court to have lands selected sold at public auction, according to the rules and regulations of the trustees, pursuant to paragraph (1) (a), Section 192.38, supra, this being the ordinary and customary procedure in purchasing Murphy lands.

(3) The county board may also proceed under Section 192.50, Florida Statutes, 1941. This section provides that a board may, without consideration and without sale, for public purposes, obtain the title to Murphy land, after certified copy of resolution of the county board, duly adopted and spread upon its minutes, showing and setting forth the present or proposed public use or purpose to which said lands are or shall be devoted, shall be transmitted to the trustees. Although the trustees' rule requiring notice to former owners has been abrogated, the second paragraph of this latter section may contemplate a notice to the former owner in view of expressions contained therein and of the fact all rules with reference to former owners have not been abrogated.

Under the method first above set out, it is to be noticed that the trustees are required to dedicate such land to the particular public use; that under the second method above there is no limitation on the use of the land after purchase; and that under the third method, the deed must be conditioned upon the land being used for public purposes.

July 14, 1945.—045-202.

MURPHY LANDS—CONVEYANCE TO COUNTY SCHOOL BOARDS

QUESTION: Do the Trustees of the Internal Improvement Fund have authority to convey Murphy lands to county boards of public instruction under the provisions of Section 192.38, Florida Statutes, 1941, as amended by Chapter 21684, Acts of 1943?

To Honorable F. C. Elliot, Secretary, Trustees of the Internal Improvement Fund:

I have examined every paragraph in this section dealing with disposal of title to land resting in the State of Florida through the provisions of Chapter 18296, Acts of 1937, and it is my belief that the trustees may only with the permission of paragraph (1) (d), below, transfer land under this section to a county board of public instruction:

"(d) Withdraw tracts or parcels from public sale considered by the trustees of the internal improvement fund to be valuable for public purposes, and dedicate such tracts or parcels to such public use considered necessary and proper by the said trustees;"

In the case of *Wilton v. St. Johns County*, 123 So. 527, 533, it was said that a schoolhouse site for a district of a dozen families is undeniably for a public use as the ground for a "State-house."

This opinion is conditioned however upon the land applied for by the county board being used by the board for educational purposes in the county.

January 29, 1946.—046-33.

MURPHY LANDS—TAXABILITY AFTER JANUARY FIRST

QUESTION: Where Murphy Act lands are deeded by the state after the first of January, although application for deed was made prior to that time, are said lands subject to taxation for the year in which purchased?

To Honorable James M. Owens, Jr., County Assessor of Taxes, West Palm Beach, Florida:

Under the laws of this state, all real property in this state is "subject to taxation on the first day of January of each year." (Section 192.04, Florida Statutes, 1941). The first day of January is fixed, by the said statute as the tax day, and as of that day owners are to make their returns, values are to be fixed and the tax laid. In this state it has been customary for the assessment to be made against the entire interest of the land and not against a possible equitable interest. Although the bid may have been accepted prior to January 1, I do not think that a Murphy Act purchaser acquired a taxable title until he obtained his Murphy Act deed.

I am, therefore, of the opinion that Murphy Act lands should not be taxed for any particular tax year unless they were owned by an individual on January 1 of that year. The above question, therefore, should be answered in the negative.

April 30, 1946.—046-178.

TAX EXEMPTION—RELIGIOUS PURPOSES

QUESTION: Is the property of a nonprofit corporation, of this state, organized for the purpose of furnishing or providing a permanent place of refuge or residence, at normal cost, to retired ministers and missionaries, during the period of their retirement, entitled to tax exemption under Section 192.06, Florida Statutes, 1941, and Section 1, Article IX, or Section 16, Article XVI, Florida Constitution?

To Honorable W. Homer Smith, Tax Assessor, DeLand, Florida:

Tax exemptions under Section 1, Article IX and Section 16, Article XVI, Florida Constitution, and Section 192.06, Florida Statutes, 1941, are determined by the character of the use of the property and not the character of the institution holding title. (*State v. Doss*, 146 Fla. 752, 2 So. 2d. 303, 150 Fla. 486, 8 So. 2d. 15.) Such provisions for tax exemption, being in the nature of special privileges, should be strictly construed. (*Lummas v. Florida Adirondack School*, 123 Fla. 810, 168 So. 232.) In order for property of charitable and other organizations to be exempt, under the above constitutional and statutory provisions, such property must be used for religious, scientific, municipal, educational, literary or charitable purposes. Numerous organizations established for many different charitable purposes have been held to come within exemption laws similar to the laws of this state above mentioned. (51 Am. Jur. 586, Section 604.)

It is a universally accepted doctrine that a charitable or like institution does not lose its charitable character and tax exemption merely because recipients of its benefits, who are able to pay, are required to do so, when funds derived in this manner are devoted to the charitable purpose of the institution. (Annotations in 34 A. L. R. 637; 62 A. L. R. 330; 108 A. L. R. 286.)

It appears from the request for opinion, the exhibits thereto, and a copy of the charter of the nonprofit corporation in question, that the buildings for which tax exemption is claimed are used "to furnish and provide retired ministers, missionaries and other Christian workers a home or sanctuary at nominal cost, and to provide maintenance for retired ministers, missionaries and other Christian workers and to maintain and provide a permanent place of refuge for such ministers, missionaries and other Christian workers during the period of their retirement."

When the institution in question and its manner of operation are construed in the light of the above statutes, laws and authorities, it seems clear that the said institution is entitled to tax exemption as long as it is operated in the same manner. The above question should be answered in the affirmative.

June 6, 1945.—045-197.

RELIGIOUS AND CHARITABLE INSTITUTIONS—EXCEPTIONS

QUESTION: Is Senate Bill No. 247 valid when it attempts to exempt from ad valorem taxation the property of every religious and charitable institution of the State of Florida, except that used for rental or leased purposes, the rentals or profits from which are not used entirely for the support, maintenance and care of orphan and dependent children?

To Honorable Millard F. Caldwell, Governor:

As requested by you, I have examined the copy of the act attached to your letter of June 5, 1945, and in connection therewith I have examined also Section 16 of Article XVI of the Constitution of Florida, which reads as follows:

"Section 16. The property of all corporations, except the property of a corporation which shall construct a ship or barge canal across the peninsula of Florida, if the legislature should so enact, whether heretofore or hereafter incorporated, shall be subject to taxation unless such property be held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes."

In the case of *State ex rel. Miller v. Doss*, County Tax Assessor, 2 So. 2d. 303, the Supreme Court of Florida had before it a similar situation and decided against the exemption and held that applying the rents to charity is too remote, and also that the corporate character of the corporation does not determine the question of exemption but the use of the property on which the exemption is claimed.

Upon the cited case it is my opinion that the act in question is violative of the terms of Section 16 of Article XVI of the constitution, and is therefore invalid.

July 6, 1946.—046-292.

EXEMPTION—CHARITABLE INSTITUTIONS

QUESTION: Is that certain property owned by the Loyal Order of Moose, in Clay county, Florida, and used as a home for aged Moose, exempt from taxation generally and also from taxes for outstanding bonded indebtedness existing when the property in question was acquired by the Moose for the purpose aforesaid; and if so, what is the extent of such exemption?

To Honorable J. M. Lee, State Comptroller:

It appears, from information obtained from the tax assessor of Clay county, Florida, that the buildings on the property are used exclusively for the housing and care of aged Moose, that room and board are supplied free of charge to the said aged Moose, and that none of the property in question is rented or otherwise used by persons other than the Loyal Order of Moose for the housing and care of such aged Moose. In the Town of Orange Park, Florida, in Clay county, the Loyal Order of Moose have acquired quite a lot of property, including some river front property, some of which lands are vacant lots. We are not informed as to whether or not these vacant lots are used by the aged Moose in any way.

Ownership and the utilization of property is the criterion for determining its exemption status under Section 1, Article IX, and Section 16, Article XVI, of the state constitution and the statutes pursuant thereto. (*Riverside Academy v. Watkins*, 155 Fla. 283, 19 So. 2d. 870; *State v. Doss*, 146 Fla. 752, 2 So. 2d. 303; *State v. St. John*, 143 Fla. 544, 197 So. 131; *Lummus v. Florida Adirondack School, Inc.*, 123 Fla. 810, 168 So. 232; and *University Club v. Lanier*, 119 Fla. 146, 161 So. 78.) To be exempt the property in question should be used exclusively for educational, literary, benevolent, fraternal, charitable or scientific purposes. (Section 192.06, Florida Statutes, 1941; *State v. Doss*, 146 Fla. 752, 150 Fla. 491, 2 So. 2d. 303, 8 So. 2d. 17.) From the above statement of facts, I am of the opinion that the property of the Loyal Order of Moose used as a home for aged Moose meets the above requirements for exemption from taxation. (See annotations in 34 A. L. R. 634, 62 A. L. R. 328, 108 A. L. R. 284, and above cited Florida cases.) However, if any part of the lands in question is not used in connection with the operation of the home, such parts would seem to be subject to taxation. It would not seem to be necessary that a building be upon lands in order for it to be used in connection with the home; it might be put to uses other than the actual housing of the aged people.

Upon the question as to whether the exemption above mentioned should extend to outstanding bonded indebtedness existing when the property was purchased and put to the uses aforesaid, there appear cases which on reading lead us to the conclusion that no such exemption exists (*Groves v. Board of Instruction*, 109 Fed. 2d. 522; *Yowell v. Rogers*, 128 Fla. 881, 175 So. 772; *Long v. St. Johns*, 126 Fla. 1, 170 So. 317), while other cases appear which indicate that such exemption exists (*American Can Company v. City of Tampa*, 152 Fla. 798, 14 So. 2d. 203; *State v. Cambell*, 146 Fla. 532, 1 So. 2d. 483). In the first above group of cases, the bonded indebtedness appears to have existed when the constitutional provision for exemption was adopted. "The exemptions provided for in section 1 of article IX and section 16 of article 16 have been in effect since 1868 . . . All purchases of securities . . . were on notice of these provisions of the constitution and the exemptions they provided and purchased with knowledge thereof. They are not now in position to complain." (*State v. Cambell*, 146 Fla. 532, 1 So. 2d. 483, text 484.) It, therefore, appears that the exemption extends to the bonded indebtedness existing when the property in question was purchased for the purpose of making it a home for aged Moose. If any bondholder objects to the exemption he has an adequate remedy to require the assessing of the property to pay his bonded indebtedness if liable.

I am, therefore, of the opinion that the above question should be answered by holding that so much of the property in question as is used exclusively as a home for aged Moose is exempt from both general and special taxation as above pointed out.

August 29, 1946.—046-369.

PROPERTY OF CHARITABLE OR RELIGIOUS INSTITUTIONS—
TAX EXEMPTION

QUESTIONS: 1. Section 192.06, Florida Statutes, 1941, in part provides that there shall be exempt from taxation "such property of education, literary, benevolent, fraternal, charitable and scientific institutions within this state as shall be actually occupied and used by them for the purpose for which they have been or may be organized; provided, **not more than seventy-five per cent of the floor space of said building or property is rented**, and the rents, issues and profits of said property are used for the educational, literary, benevolent, fraternal or charitable purposes of said institutions." What construction should be placed upon the phrase "not more than seventy-five per cent of the floor space of said building or property"?

2. Where an educational, literary, scientific, religious or charitable institution in this state owns two or more contiguous parcels of land, in this state, on which are located two or more separate buildings, some of which buildings, consisting of more than twenty-five per cent of the total floor space of the several buildings located on the contiguous parcels of land, are occupied by said institution and the remainder of said floor space is rented, is the entire area of land entitled to exemption from taxation under the statutes and constitution of this state?

3. Where a religious organization owns a parcel of land upon which is located a church building and a parking lot which is rented, the church building occupying more than seventy-five per cent of the area of the parcel of land, is the entire parcel of land, consisting of the church building and the parking lot, entitled to exemption from taxation under the statutes and constitution of this state?

To Honorable J. M. Lee, Comptroller:

These questions involve a construction of Section 1, Article IX, and Section 16, Article XVI, of the state constitution, and Section 192.06, Florida Statutes, 1941, as amended. The first two questions involve the two constitutional provisions and subsection (3) of said statute, while the third or last question involves the two constitutional provisions and subsection (4) of said statute. The main difference between subsection (3) and subsection (4) just mentioned seems to be that subsection (3), which does not have any application to religious institutions, permits the renting of "not more than seventy-five per cent of the floor space" of the institution's property if the rents, issues and profits are used for institutional purposes; while subsection (4), which has application to religious institutions only, permits no renting of the property of religious institutions except for school purposes.

There is a distinction between the above sections of the state constitution in that Section 1, Article IX, is not self-executing and merely authorizes the exemption of the property mentioned by the legislature, while Section 16, Article XVI, is self-executing and needs no legislation to make it effective and cannot be changed by the legislature. (*Fleischer Studios v. Paxton*, 147 Fla. 100, 2 So. 2d. 293, text 294; *Lummus v. Miami Beach Congregational Church*, 142 Fla. 657, 195 So. 607, text 608; *Lummus v. Florida-Adirondack School, Inc.*, 123 Fla. 810, 168 So. 232; *Maxcy v. Federal Land Bank*, 111 Fla. 116, 150 So. 248; *State v. Doss*, 150 Fla. 486, 8 So. 2d. 15.) Section 1, Article IX, is operative through Section 192.06, while Section 16, Article XVI, is in force by reason of its self operation. The exemption under Section 1, Article IX, is limited by the laws which make it operative; there is no such limitation of Section 16, Article XVI.

Exemptions to unincorporated institutions must be determined by Section 1, Article IX, of the constitution, and the statutes; exemptions to incorporated institutions are determined by Section 16, Article XVI, of

the constitution, and, in some instances, also by Section 1, Article IX, of the constitution, and the statutes. (*State v. Doss*, 150 Fla. 491, 8 So. 2d. 17, and *State v. Jones*, 150 Fla. 496, 8 So. 2d. 19.)

Under Section 16, Article XVI, of the constitution, property to be exempt to an incorporated institution must "be held and used exclusively for" one of the eleemosynary purposes mentioned in the section. Under Section 1, Article IX, of the constitution, and Section 192.06, although property of educational, literary, benevolent, fraternal, charitable and scientific institutions must "be actually occupied and used" for the purposes of the institution, the rental of "not more than seventy-five per cent of the floor space" of such property may be considered as such use if "the rents, issues and profits" from such rental are used for the purposes of the institution.

Under Section 16, Article XVI, of the constitution, and under Section 1, Article IX, of the constitution, and Section 192.06, Florida Statutes, 1941, as amended, the "utilization of the property is the criterion in determining its liability or non-liability for taxes." (*Riverside Military Academy, Inc. v. Watkins*, 155 Fla. 283, 19 So. 870, text 871; see also, *Dr. William Howard Hay Foundation v. Wilcox*, (Fla.) 24 So. 2d. 237; *University Club v. Lanier*, 119 Fla. 146, 161 So. 78; *Lummus v. Florida Adirondack School*, 123 Fla. 832, 168 So. 232; *Miami Battlecreek v. Lummus*, 140 Fla. 718, 192 So. 211.)

These exemption provisions in the constitution and statutes are to be construed against the exemption claimant and in favor of the taxing power in the case of doubt. (*Steuart v. State*, 119 Fla. 117, 161 So. 378; *Lummus v. Florida Adirondack School*, supra; *State v. Doss*, 146 Fla. 752, 2 So. 2d. 303.)

Exemption of property used for eleemosynary purposes from taxation in this state dates back until 1845 and prior thereto (see Chapter 10, Acts 1845; Chapter 1713, Acts 1869; Chapter 3219, Acts 1881; Section 332, Revised Statutes, 1892; Section 431, General Statutes, 1906, and subsequent statutes), the examination of which laws reveals that prior to Chapter 5596, Acts of 1907, such property was not exempt if rented, although the rents, issue and profits were used by the institution. The 1907 act permitted the renting of the ground floor of the lodge building and the use of the rents, issues and profits therefrom for institutional purposes, without defeating the right to exemption. This provision remained in the statutes until 1937, when Chapter 18312, Acts of 1937, changed the law so as to permit renting not more than fifty per cent of the property, and in 1939 this was changed, by Chapter 19376, Acts of 1939, so as to permit the renting of not more than seventy-five per cent.

As a general rule, tax exemptions may extend to more than one building or property of an eleemosynary institution (Annotations in 17 A. L. R. 1027; 28 A. L. R. 861; 81 A. L. R. 1178). Exemption of properties rented have been upheld where the rents, issues and profits therefrom have been used for eleemosynary purposes. (61 C. J. 473, 485 and 491, Sections 542, 567 and 576; *State v. Doss*, 150 Fla. 486, 8 So. 2d. 15.)

As above stated, the statute permits exemptions where not "more than seventy-five per cent of the floor space of" the institution's building or property is rented, etc. The word "building" was first introduced into the statute in 1907, but in 1937 and 1939 the words "building or property" were used instead of the word "building." These words evidently refer back to the reference to the property of the institution used in the first part of the statute. (See Section 192.06, subsection (3), of the statute.) The word "floor" has been given many definitions or meanings, such as the floor of a room, a floor in a building, floor of a bridge, floor of a mine, floor of a cave, and many other meanings. The use of the phrase "floor space of said building or property" evidently has reference to the area or footage of the property in question, entitled to exemption, whether the same be a building or other property.

I see no legal difference between an institution having a twenty story building of ten rooms each, and twenty separate buildings of ten rooms each, or a one story building with twenty groups of ten rooms each, where all rooms are identical. I am of the opinion that the legislature intended to permit the renting of seventy-five per cent of the floor space, whether in one or more buildings located on the same parcel of land. Contiguous lots of land for most practical purposes may be considered as one parcel of land.

From the above and foregoing laws and authorities, I am of the opinion that the questions above stated should be answered as follows:

1. The phrase "not more than seventy-five per cent of the floor space of said building or property," as used in subsection (3) of Section 192.06 of the statute, means not more than seventy-five per cent of the square area or footage of the property of an eleemosynary institution located upon the same parcel of land. Contiguous lots owned by the same institution, which may be assessed for taxes as one item, for all practical purposes, may be considered as one parcel of land.

2. The second question should be answered in the affirmative, assuming that the institution comes under Section 1, Article IX, of the constitution and subsection (3) of Section 192.06 of the statute. A different rule may apply to corporations coming under Section 16, Article XVI, of the constitution, and not also under Section 1, Article IX, and the above statute.

3. The third question cannot be answered by a yes or no answer. It must be answered by a construction of subsection (4) of Section 192.06 of the statute (which contains **no provision for renting** a part of the property in question, as does subsection (3) of the same section), with Section 16, Article XVI, of the constitution. Under said subsection (4) the church house and the land upon which it stands are exempt from taxation, but any part of the church property rented or hired for other than church or school purposes is subject to taxation. If the parking lot mentioned in the third question is rented it would be subject to taxes, although the rents, issues and profits were used for church purposes.

4. With further regard to churches and other institutions which also come within Section 16, Article XVI, or which only come within said section. This section requires that property be **held and used exclusively** for the purposes named. Church property nonexempt under Section 192.06 of the statutes may be exempt under this section if within its purview. (*Lummas v. Miami Beach Congregational Church*, 142 Fla. 657, 195 So. 607.) In proper cases, the portion of the property entitled to exemption under this section may be severed from the nonexempt portion for the purposes of taxation. (*State v. Doss*, 150 Fla. 491, 8 So. 2d. 17, text 18.)

TAXATION

August 13, 1945.—045-236.

HOMESTEAD EXEMPTION—HOTELS

QUESTION: Where the owner of two hotels, located in the same incorporated municipality of this state, resides in one of said hotels and in good faith makes it his permanent home, may he claim a homestead tax exemption upon such hotel under Section 7, Article X, Florida Constitution?

To Honorable W. L. Slay, Tax Assessor, Holmes County, Bonifay, Florida:

We are presuming that the owner of the hotel operates it as his business and not through a lessee.

Under Section 7, Article X of the constitution, "every person who has the legal title . . . to real property in this state and who resides thereon and in good faith makes the same his or her permanent home . . . shall be entitled to an exemption from . . . taxation . . . up to the assessed value of \$5,000.00 on said home and contiguous real property as defined in Section 1, Article X of the Constitution." Under Section 1, Article X of the constitution the exemption "shall not extend to more improvements or buildings than the residence and business house of the owner."

It has been held in many jurisdictions that a building used by the owner and his family as a residence may be claimed as a homestead, although the owner was conducting therein the business of a hotel (annotation 114 A.L.R. 222-226; 40 C.J.S. 465, Section 36). In several jurisdictions under constitutions similar to the above provisions of the Florida Constitution it has been held that the buildings on the homestead property used by the owner in the prosecution of his ordinary business may be claimed as a part thereof (annotation 114 A.L.R. 232-237).

In this case we are presuming that the hotel sought to be claimed as a homestead does not occupy an area in excess of one-half acre and that the hotel is operated as a part of the business of the owner so that it may well be classified as his business house as well as his residence.

Under the above circumstances and law, I am of the opinion that the owner of the hotel may claim a tax exemption thereon up to the value of \$5,000.00 as provided in Section 7, Article X of the Florida Constitution.

April 9, 1946.—046-128.

EXECUTOR OF WIDOW—HOMESTEAD EXEMPTION

QUESTION: A widow died on January 23, 1946, leaving no children. The executors of her estate applied for homestead exemption allowed by Article X, Section 7 of the constitution and Section 192.12, Florida Statutes, 1941, on March 30, 1946, for the year 1946. May the executors be allowed this exemption?

To Honorable J. M. Lee, State Comptroller:

The widow during her lifetime was entitled to claim the exemption as provided by Article X, Section 7 of the constitution and Section 192.12, Florida Statutes, 1941. She had until April 1, 1946 to file application for said exemption (Section 192.16, Florida Statutes, 1941). She did not file said exemption and died on January 23, 1946.

From the correspondence I gather that she was not the head of the family, and Article X, Section 1 of the constitution would not apply.

Section 733.01, Florida Statutes, 1941, says:

"The personal representative shall take possession of all the estate of a decedent, real or personal (except homestead)."

I construe the word homestead to mean the homestead as provided by Article X, Section 1.

The executors of the estate took possession of the real estate herein concerned.

Inasmuch as the widow had until April first to file her application for the exemption of her property from taxation, I think this privilege inured to her executors and they having availed themselves of this privilege are entitled to claim the property exempt from taxation as provided by said Article X, Section 7 of the constitution and Section 192.12, Florida Statutes, 1941.

January 29, 1946.—046-42.

HOMESTEAD EXEMPTION—CLAIM BY ESTATE

QUESTION: Where the owner of a homestead in this state, entitled to tax exemption thereon, died on March 4, 1945, without filing claim for homestead tax exemption under Section 192.16, Florida Statutes, 1941, may such owner's personal representative file such claim when the decedent was survived by lineal descendants?

To Honorable J. M. Lee, State Comptroller:

It appears from the request for opinion and the papers submitted with it, that the owner of the homestead in question was a widow with a minor child so that she was not only entitled to exemption from taxation but also exemption from execution under the statutes and constitution of this state.

When the owner of the above homestead died, the said homestead descended to the heir and the personal representative acquired no jurisdiction over the same by virtue of the administration proceedings. (Sections 731.05, 731.23 and 733.01, Florida Statutes, 1941; *Wain v. Howard*, 142 Fla. 736, 196 So. 210; *Spitzer v. Branning*, 135 Fla. 49, 184 So. 770). The homestead is not subject to testamentary disposition. (*Brickell v. Di Pietro*, 145 Fla. 23, 198 So. 806; *Scull v. Beatty*, 27 Fla. 426, 9 So. 4).

I gather from your request, and the papers submitted with it, that the application for tax exemption in question was made by the personal representative of the decedent, and not by the heir or any legal representative of the heir. The personal representative of the decedent having no jurisdiction over the property in question and not representing the successor in title to the decedent, was without authority to make the attempted application.

The above question must be answered in the negative.

March 8, 1946.—046-92.

HOMESTEAD EXEMPTION—MULTIPLE OWNERSHIP

QUESTION: Where a building, containing two or more apartments, is owned by two or more persons, who maintain separate homes in the said building by occupying one or more of the apartments, is each owner-occupant entitled to a homestead exemption to the amount of \$5,000.00, or must the aggregate of the exemptions be limited to \$5,000.00?

To Honorable J. M. Lee, State Comptroller:

Section 7 of Article X of the state constitution, and Section 192.12, Florida Statutes, 1941, provide for the exemption of homesteads in this state from taxation but limit this exemption to \$5,000.00 on any one homestead. Where a homestead is owned by two or more persons, the exemption must be apportioned "among such of the owners as shall reside thereon, as their respective interests shall appear, but no such exemption of more than five thousand dollars shall be allowed to any one person or any one dwelling house, nor shall the amount of the exemption allowed any person exceed the proportionate assessed valuation based on the interest owned by such person."

Exemptions from taxes, whether stated in the constitution or in the statutes, are to be construed against the claimant and in favor of the taxing power, in cases of doubt. Homestead exemptions under the constitution and statutes of this state should not be allowed unless such claim is sustainable under the precise language of the constitution and statutes (*Steuart v. State*, 119 Fla. 117, 161 So. 378, text 379; *Rast v. Hulvey*, 77 Fla. 74, 80 So. 750). Although a portion of a building, as in the case

of an apartment in an apartment house, may constitute a homestead (40 C. J. S. 507, Section 68), this homestead cannot exceed the sum of \$5,000.00 as exemption to any one person or to any one dwelling house.

The phrase "dwelling house" has been applied to numerous and sundry conditions, buildings, rooms, houses, etc., (13 Words and Phrases, 716-740), so that the phrase "dwelling house," as used in the above statute, appears to be uncertain and ambiguous. The phrase being uncertain and doubtful in its meaning, the statute must be construed in favor of the taxing power and against the claimant.

I, therefore, believe that the above question should be answered by holding that the aggregate of the exemptions must be limited to \$5,000.00 until this question is cleared up by an opinion of the supreme court. If any group of taxpayers owning an apartment house believes that they are entitled to an aggregate exemption in excess of \$5,000.00, they have an adequate remedy to test the question in the courts, by mandamus to the tax assessor to require him to grant them the proper exemption.

April 6, 1946.—046-134.

SERVICEMEN—RE-ENLISTMENT—HOMESTEAD EXEMPTION

QUESTION: Are servicemen, who re-enlist in the armed forces after being discharged from their wartime service, entitled to homestead exemption from taxation in this state, where such alleged homesteads are not occupied by such servicemen or their families but are rented during the period of time for which exemption is claimed?

To Honorable J. M. Lee, State Comptroller:

Under Section 7, Article X, of the state constitution, and Section 192.12, Florida Statutes, 1941, homestead exemptions are only allowable when the owner "resides thereon and in good faith makes the same his or her permanent home, or the permanent home of another or others legally or naturally dependent upon" such owner. Constitutional and statutory provisions for tax exemption are to be construed against the claimant and in favor of the taxing power (*Steuart v. State*, 119 Fla. 117, 161 So. 378, text 379). Temporary absence from the homestead in search of health, pleasure, business, education of children and the like will not deprive the homestead of its status as such (*Hillsborough Investment Company v. Wilcox*, 142 Fla. 889, 13 So. 2d. 443, text 450; *Collins v. Collins*, 150 Fla. 374, 7 So. 2d. 443, text 444; 40 C. J. S. 641-648, Sections 164-166).

From the request for opinion and the letter attached thereto I find no indication that the family of the person enlisting in the armed forces intends to occupy the premises; in fact, the information that the premises will be rented seems to overcome such presumption.

Section 192.55, Florida Statutes, 1941, appears to relate merely to the manner of claiming homestead exemption by members of the armed forces and not to the question of what constitutes a homestead.

It appears from the above authorities and the information contained in the request for opinion that the above question should be answered in the negative. It does not appear that the serviceman clearly intends to maintain this property as his homestead within the requirements of the above constitutional and statutory provisions.

January 29, 1946.—046-32.

HOMESTEAD EXEMPTION—AFTER JANUARY FIRST

QUESTION: May the purchasers of real estate after the first day of January of any year claim the same as a homestead and exempt from taxation for the year in which purchased?

To Honorable James M. Owens, Jr., County Assessor of Taxes, West Palm Beach, Florida:

Under the laws of this state all real property in this state is "subject to taxation on the first day of January of each year." (Section 192.04, Florida Statutes, 1941). The first day of January is fixed by the said statutes as the tax day, and as of that day owners are to make their returns, values are to be fixed and the taxes laid. The status of real estate on the first day of January of any year determines the person to whom assessed, the value of the property and the right to exemption.

The above question, therefore, should be answered in the negative.

May 10, 1946.—046-196.

HOMESTEAD EXEMPTION—CITIZENSHIP NOT ESSENTIAL

QUESTION: Is citizenship essential to one claiming the benefits of the homestead tax exemption as provided by Article X, Section 7, of the Constitution of Florida:

To Honorable Murray Sams, State Attorney, Seventh Judicial District, DeLand, Florida:

Article X, Section 7, when added to the constitution of the State of Florida, by amendment adopted in 1934, restricted benefits to "head of a family who is a citizen of and resides in the State of Florida." The said section was amended in the general election of 1938 and the requirement of citizenship was omitted therefrom. The said section now reads:

"Every person who has the legal title or beneficial title in equity to real property in the state and who resides thereon and in good faith makes the same his or her permanent home . . . shall be entitled to an exemption from all taxation, etc. . ."

See also Section 192.12, Florida Statutes, 1941, which embodies the same language.

In Article X, Section 1, somewhat similar language is used and in the case of *Crocker v. Crocker*, CCA, 51 Fed. 2d. 11, it was there held citizenship was not essential to obtain the benefits under said Article X, Section 1.

In my opinion citizenship is no longer an essential requirement for homestead tax exemption as provided by said Article X, Section 7, of the constitution.

July 23, 1946.—046-313.

HOMESTEAD EXEMPTION—SINGLE PERSON

QUESTION: Are Section 7, Article X of the state constitution and the statute based thereon, Section 192.12, Florida Statutes, 1941, broad enough to cover a single person who has no dependents of any kind or nature?

To Honorable M. C. Scofield, Attorney, Board of County Commissioners, Citrus County, Inverness, Florida:

This constitutional provision for homestead exemption now provides that "every person who has the legal title or beneficial title in equity to real property in this state and who resides thereon and in good faith makes the same his or her permanent home . . . shall be entitled to" the exemption. Previous to the adoption of this amendment by the November, 1938 election, the exemption had been allowed only to the "head of a family." It is evident by the amendment that the legislature intended to include every person who is capable under our law of acquiring by himself or herself a permanent home.

It is my opinion, therefore, that your question must be answered in the affirmative.

August 21, 1946.—046-376.

HOMESTEAD EXEMPTIONS—RESIDENCE—ASSESSMENTS

QUESTIONS: 1. What portion of each year are owners of homesteads required to occupy the same in order to be eligible to homestead exemption from taxation?

2. Where the owner and occupant of a large residence rents out a considerable part thereof for apartment, furnished room or transient room services, is such owner entitled to homestead exemption from municipal taxes on such residence?

3. Where homesteads are exempt from general municipal taxes, are they also eligible for exemption from special assessments for street, sewer, sidewalk and other special improvements?

To the Board of Councilmen, Town of Crescent City, Crescent City, Florida:

Under Section 7, Article X, of the state constitution, "every person who has the legal title or beneficial title in equity to real property in this state and who resides thereon and in good faith makes the same his or her **permanent home** . . . shall be entitled to an exemption from taxation, **except for assessments for special benefits**, up to the assessed valuation of five thousand dollars on the said home and contiguous real property, as defined in Article X, Section 1, of the constitution." Under Section 1, Article X, of the constitution, above referred to, "a homestead to the extent of . . . the half of one acre within the limits of any incorporated city or town . . . and the improvements on the real estate" however, not extending "to more improvements or buildings than the residence and the business house of the owner" is exempt to the owner.

Under Section 192.14, the words "permanent home" should not be construed so as to require continuous physical residence on the homestead property, "but means only the place where the person claiming the exemption may rightfully and in good faith call his home to the exclusion of all other places." Under the general homestead laws of this state, "the temporary absence from the homestead . . . in search of health, pleasure or for business reasons, will not deprive it of the homestead status." (Hillsborough Investment Company v. Wilcox, 152 Fla. 889, 13 So. 2d. 448, text 450; see also Collins v. Collins, 150 Fla. 374; 7 So. 2d. 443, text 444; Matthews v. Jeacle, 61 Fla. 686, 55 So. 865; Murphy v. Farquhar, 39 Fla. 350, 22 So. 681; 40 C. J. S. 647 and 648, Section 166; 26 Am. Jur. 120, Section 194). To retain his homestead rights, one leaving a homestead must in good faith intend to return at some future date; however, it is not essential that he should intend to return at any particular time in the future. (40 C. J. S. 645 and 646, Section 166). Such intention is to be gathered from the declarations of the homestead claimant, his actions and the surroundings and environment accompanying his absence. (40 C. J. S. 646, Section 166). These authorities seem to answer the first question.

It has been held in many jurisdictions that a building used by an owner and his family as a residence may be claimed as a homestead, although the said owner may conduct therein a hotel or lodging house, or may conduct his ordinary business therein (40 C. J. S. 465, Section 36; 114 A. L. R. 222-226 and 232-237), or lease a part thereof to tenants for residential purposes (128 A. L. R. 1431-1437). It is the principal use to which the property is subjected and not the incidental uses that determine its status as a homestead. (40 C. J. S. 464, Section 36). The business house of the owner of a homestead may be located on the exempt homestead property. (Section 1, Article X, state constitution). This seems to answer the second question.

Homestead property described in Sections 1 and 7, Article X, of the state constitution, is not exempted from assessments for special benefits to the property itself. (*State v. Henderson*, 137 Fla. 666, 188 So. 351; *Florida Inland Navigation District case*, 121 Fla. 486, 163 So. 890; *State v. Dreka*, 135 Fla. 463, 185 So. 616). The constitutional amendment providing for exemption of homesteads from taxation provides that such homesteads "shall be entitled to an exemption from all taxation, **except for assessments for special benefits.**" This answers the third question.

From the above constitutional provisions, statutes and authorities, I am of the opinion that:

1. The first question should be answered by stating that the laws do not require the occupancy of a homestead in this state for any definite part of the year nor do they require continuous physical residence on the property. Each case should be governed by the rules above announced.

2. The second question should be answered by stating that the fact a homestead claimant may rent a part of his residence for apartments, furnished rooms or transient room services does not for that reason alone render him ineligible for exemption. Each case should be governed by the rules above announced.

3. The third question should be answered in the negative. Although homesteads are exempted from general taxes, they are not exempted from assessments for special benefits.

As the statutes of this state only permit this office to render official opinions to state officers, boards, commissions and agencies, this opinion must be considered as unofficial.

July 27, 1946.—046-338.

HOMESTEAD EXEMPTION—APPLICATION—ALLOWANCE

QUESTIONS: 1. Does the board of county commissioners of Hillsborough county have the authority to allow homestead exemption under Section 7, Article X, Florida Constitution, and Section 192.16, Florida Statutes, 1941, as amended by the laws of 1943, where the property owner did not file his application therefor prior to April 1, and the assessor has denied same?

2. Does the board when acting as a board of equalization have such power?

To Honorable John M. Allison, County Attorney, Hillsborough County, Tampa, Florida:

In answer to your first question: Section 7, Article X of the constitution says that "the legislature may prescribe appropriate and reasonable laws regulating the manner of establishing the right to said exemption."

Section 192.16, Florida Statutes, 1941, as amended, and as applied to Hillsborough county, which is considered one of our largest counties, says:

"Each taxpayer who claims said exemption shall file one of the said forms properly filled out and executed with the assessor on or before April first of each year; and the failure to do so shall constitute a waiver of said exemption for such year . . ."

In my opinion Section 192.16 is a reasonable law and, unless the property owner is unable to waive said exemption (due to insanity or the like) I feel that the board of county commissioners as a general

proposition has no power to allow such exemption where no application is filed as required by said section. I use the term "general proposition" for each case must of necessity be governed by its own peculiar facts.

In answer to your second question: In my opinion, the board of county commissioners acting as a board of equalization does not have such power. When acting as a board of equalization, the board's power is limited to "only such special and limited power as is especially conferred by statute to secure equalization of tax values." (*Sparkman v. State*, 71 So. 34, text 41).

June 7, 1945.—045-135.

BROTHERHOOD OF CARPENTERS AND JOINERS—EXEMPTION

QUESTION: Is property held by the United Brotherhood of Carpenters and Joiners of America entitled to exemption under the constitution and laws of Florida?

To Honorable J. M. Lee, State Comptroller:

In reply to your inquiry I beg leave to state that in my opinion the property of the United Brotherhood of Carpenters and Joiners of America mentioned in the charter attached to your letter, is not entitled to exemption.

There is nothing to indicate in this charter or in your letter that the property of the said Brotherhood is used for either municipal, educational, literary, scientific, religious or charitable purposes. On the contrary, the charter discloses that the created entity is empowered to transact business and in recent disclosures in pleadings and arguments in cases involving labor unions, such unions appear and claim to be lucrative enterprises.

As above implied, my opinion is that the exemption should not be allowed, both under the authority cited in your letter and cases of similar import cited under Article IX, Section 1 of the annotated constitution of Florida.

February 8, 1945.—045-32.

HOMESTEAD EXEMPTION—AFTER CONVEYANCE OF PROPERTY

QUESTION: Is a person owning and occupying land as homestead on January 1, 1945, entitled to file claim for and receive homestead tax exemption thereon for 1945 after selling and conveying such homestead on January 20, 1945?

To Honorable Murray Overstreet, Attorney for the Board of County Commissioners, Kissimmee, Florida:

Section 192.04, Florida Statutes Annotated, provides, in part, as follows:

"All real and personal property shall be subject to taxation on the first day of January of each year, and shall be a lien upon such property for the purposes thereof."

It is my opinion that, under this statutory provision the question of whether property is exempt or nonexempt must be determined as of January first, and that a person entitled to claim a homestead tax exemption on the first day of January is not deprived of such exemption because he subsequently sells and conveys his homestead before filing claim for the exemption. His application may be made on the statutory form, after amending same so as to show that the facts set forth are those existing on January 1, 1945.

Section 192.15, Florida Statutes Annotated, as qualified by Section 192.57, F. S. A., provides that the application shall be **substantially** in the statutory form. Said form is couched in the present tense, but its statements are to be construed as referring to the facts as they existed on January first, not as they exist on the date the application is made. Any other construction would enable a person to acquire a homestead on March thirty-first, truthfully make a valid application on the statutory form on April first, and obtain the exemption for the year, thereby rendering meaningless the above quoted provision of Section 192.04.

July 30, 1946.—046-324.

WIDOWS' EXEMPTION—RESIDENCE

QUESTIONS: 1. "Property to the value of \$500.00 to every widow, and to every person who is a bona fide resident of the state, and has lost a limb or been disabled in war or by misfortune." (Section 192.06 (7).)

Does the above provision provide exemption for a widow who is a nonresident of Florida?

2. "Under the 1940 amendment to Article IX, Section 9 of our state constitution (which is the same language as is found in Section 192.06, Florida Statutes, 1941), a widow is entitled to \$500.00 exemption . . . Of course, she must also be a resident of the state."

Does the above provision provide exemption for a widow who is a resident of Florida, but a nonresident of the municipal taxing unit of Apalachicola?

To Honorable C. H. Bourke Floyd, City Attorney, Apalachicola, Florida:

On February 10, 1941, I rendered an opinion, to which I still adhere, and which I think will answer Question 1.

I think Question 2 is answered by an opinion of the Honorable George Couper Gibbs, a former Attorney General of Florida, which opinion is dated June 1, 1939, and reads in part as follows:

"You will see from the constitution and laws of this state that there is no requirement that a widow must reside in the county where she claims her exemption before she is entitled to the exemption provided by the law and the constitution. It is, therefore, my opinion that the claims for widows' exemption . . . must be allowed upon property which they own in any one county although such widows may not reside in that county. Of course the exemption cannot be allowed except in one county."

I concur in this opinion.

November 8, 1945.—045-354.

BUSINESS AND COMMERCIAL SCHOOLS—EXEMPTION

QUESTION: Is the real and personal property of business and commercial training schools and colleges in this state exempt from ad valorem taxes?

To Honorable James M. Owens, Jr., County Tax Assessor, West Palm Beach, Florida:

Section 1, Article IX, and Section 16, Article XVI, of the state constitution, authorizes the exemption from taxation of property held or used for **educational purposes**. Section 192.06, Florida Statutes, 1941, as amended, provides for the exemption of the property of educational institutions actually occupied and used by such institutions for educational purposes. It is not the character of the owner, occupant or user of the

property that determines its exemption, but the use of the property. (State v. Doss, 146 Fla. 752, 2 So. 2d. 303, text 304). The exemptions in question refer to ad valorem taxes and not to license taxes. (Miami Beach College Corporation v. Tomlinson, 143 Fla. 57, 196 So. 608). Statutes granting exemptions from taxation should be strictly construed (State v. Doss, supra).

It was not the intention of the legislature to exempt from taxation property used for educational purposes jointly with other uses and purposes. (Rast v. Hulvey, 77 Fla. 74, 80 So. 750, text 752). The requirement is that the property shall be used exclusively for educational purposes.

The institution is no less an educational one where tuition fees are charged. Any profits remaining on hand after the payment of operating expenses may be distributed to the stockholders of the institution. The earning of a livelihood for the operators of the institution, or even a mere incidental surplus, will not effect a change in the purposes of the institution. It is a requirement for exemption that the property be used exclusively for educational purposes. If it is used for any other purpose the exemption does not attach.

I am, therefore, of the opinion that the real and personal property of business and commercial training schools and colleges in this state is exempt from ad valorem taxes only when used exclusively for educational purposes. Such property is not exempt if the purpose of the operation of the institution is not educational. The law requires that the institution claim the exemption by tax return as to personal property and failure to claim the same amounts to a waiver of the exemption. (Section 200.15, Florida Statutes, 1941).

August 11, 1945.—045-233.

BANKS AND CREDIT ASSOCIATIONS—EXEMPTIONS

QUESTION: Are state banks and credit associations in this state, because of the provisions of Chapter 21842, Acts of 1943, now Section 192.54, 1943 Cumulative Supplement, Florida Statutes, 1941, exempt from intangible taxes on mortgages?

To Honorable Joe Dobson, Clerk of the Circuit Court, Baker County, Macclenny, Florida:

Said Section 192.54 provides as follows:

"All banks, trust companies and Morris plan banks, now or hereafter chartered under the laws of the State of Florida, shall have the same immunity from state and local taxation that national banking associations have from time to time under the statutes of the United States."

Under this section state banks, trust companies and Morris plan banks are exempt from taxes to the same extent as are national banking associations. This section does not expressly relate to credit associations.

Under Title 12, Section 548, United States Code Annotated, only the real property, shares of stock and income of national banking associations are subject to state taxation and then only when the conditions and requirements of the said section are complied with (Roberts v. American National Bank, 97 Fla. 411, 121 So. 554). Under this section states and their political subdivisions may not tax the personal property of national banking associations (see annotations, under note 63, to the above section of the Code; 10 Zollman, Banks and Banking, 523-525, Section 7043; 51 Am. Jur. 312, 313, Section 258), including their mortgages (First National Bank vs. Kreig, 21 Nev. 404, 32 Pac. 641). This answers the above question in so far as it relates to state banks.

Credit associations and unions organized under state law (Chapter 657, Florida Statutes, 1941), are not mentioned in above Section 192.54, and, therefore, are not expressly included therein. The intangible personal property of several federal associations, unions, etc., are exempt from state and local taxation under federal law. For example: federal credit unions (Tit. 12, Sec. 1768, U. S. C. A.); central banks for cooperatives, production credit corporations and associations and banks for cooperatives (Tit. 12, Sec. 1138c, U. S. C. A.); federal farm mortgage corporations (Tit. 12, sec. 1020f, U. S. C. A.); federal land banks and national farm loan associations (Tit. 12, Sec. 931, U. S. C. A.); federal intermediate credit banks (Tit. 12, Sec. 1111, U. S. C. A.); and federal reserve banks (Tit. 12, Sec. 531, U. S. C. A.). This list of federal corporations and associations is not intended to be exhaustive.

You do not state what kind of credit association you had in mind; therefore, we are unable to give more than a general discussion on this point as above set out, which we hope will be sufficient information for your purposes.

February 27, 1946.—046-73.

LAND PARCEL—DEFINITION

QUESTION: What construction is to be placed upon the word "parcel" whereby Chapter 20424, Acts of 1941 (Section 192.45, Florida Statutes, 1941), the trustees are directed to sell Murphy Act lands formerly owned by a municipality for the sum of one dollar for "each and every parcel of land" so sold?

To Honorable F. C. Elliot, Secretary & Engineer, Trustees of the Internal Improvement Fund:

Ballentine's Law Dictionary defines parcel as follows:

"As signifying a quantity of land, the word is synonymous with the word 'lot' or 'tract.' See Ramsey County v. Robert P. Lewis Company, 72 Minn. 87, 42 L.R.A. 639, 75 N. W. Rep. 108."

Interpretations of statutory provisions may be controlled by their practical operation and effect and a reading of Chapter 20424, 1941, leads me to believe that the legislature intended the word "parcel" to refer to a single lot. In the great majority of cases such interpretation would accomplish a rational and sensible construction and give effect to the legislative purpose and intent. This construction is supported by decisions from other jurisdictions.

It would also seem that, this act applying solely to municipalities and property in municipalities usually being subdivided into lots, the language "each and every parcel" was intended in all likelihood to be construed as "each and every lot."

When a municipality requests a conveyance from the State of Florida under this chapter, it is my opinion that it must be considered that the word "parcel" refers to a lot.

April 24, 1945.—045-100.

TITLE TO LAND—REVERSION UNDER LIEN

QUESTION: Can title to land vest in the state by means of the lien of delinquent taxes for 1933, the land never having been sold and no certificate ever having issued for the said 1933 taxes?

To Honorable F. C. Elliot, Secretary, Trustees of the Internal Improvement Fund:

Under the holding of this office in an opinion rendered under date of August 13, 1941 (See Biennial Report 1941-1942, pages 189, et seq.), and by authority of the cases cited in that opinion, I reaffirm the same and answer the question submitted by you in the affirmative. In doing this, however, I wish to definitely state that I will not apply the same ruling to delinquencies for 1934, because it is entirely possible under the system of certificating such delinquencies that the certificate issuing for next year might not be issued by the clerk within the time so as to bring the land involved within the two-year period of the statute, and I think that the word "certificate" used in Section 9 of the original act (Section 192.38, Florida Statutes, 1941), must be given a meaning that every application under the law would have to be within the time that such certificates should have issued.

In rendering this opinion I wish to further state that there is considerable doubt in my mind as to the correctness of the position here taken and it would seem that the particular deeds upon which the question is submitted might well be made a test case before our state courts for judicial determination, and I recommend that you bring these deeds with this opinion and the former opinion of August 13, 1941, before the trustees for definite instructions in this matter.

February 27, 1945.—045-55.

COUNTY LANDS—TIME OF SALE

QUESTIONS: 1. Where various parcels of county lands are advertised for sale between 11 A. M. and 2 P. M. under the provisions of Section 21, Chapter 22079, Acts of 1943, what procedure should be followed as to such of said parcels as you are unable to auction off by 2 P. M.?

2. Does war time govern sales of county lands made under Section 21, Chapter 22079, Acts of 1943?

To Honorable H. C. Mickler, Clerk of the Circuit Court, Hernando County, Brooksville, Florida:

When you have advertised several parcels for sale on a certain date, it is my opinion that you may continue making sales until you have auctioned off all of said parcels even though this requires you to sell some parcels after 2 P. M. If you are unable to open the sale of any parcel at the time stated in the notice, I think that at the time and place specified in such notice you should publicly adjourn such sale and announce the time when it will be resumed at the same place.

Under Section 1.02, Florida Statutes, 1941, United States Standard Time for your zone is to be adhered to in making sales under Section 21 of Chapter 22079, Acts of 1943. By Act of Congress approved January 20, 1942 (15 U.S.C.A., Section 261), Standard Time was advanced one hour to what is commonly referred to as "War Time." Therefore, in making such sales, you will be governed by the war time for your zone so long as such war time is in effect under said Act of Congress.

May 21, 1945.—045-119.

TAX CERTIFICATES—SUFFICIENCY OF DESCRIPTION

QUESTION: Will the description in a tax sale certificate, "Block 40, N-½ Block 238," there being a lot 238 but no block 238 in the subdivision, vest title in the state under the Murphy Act?

To Honorable F. C. Elliot, Secretary, Trustees of the Internal Improvement Fund:

This inquiry concerns a subdivision, known as "A" Improvement Company. An area was divided into 660 lots, they being numbered from 1 to 660. These lots were placed in blocks numbered from 1 to 118, and each block contained a series of the above consecutively numbered lots; for example, Block 96, embraced Lots 527 to 532. The description here in question, as aforesaid, is as follows: "Block 40, N- $\frac{1}{2}$ Block 238."

The supreme court lately held that a tax deed will not be held void for uncertainty of description if, by any reasonable construction, it can be made available, and extrinsic facts pointed out in the description may be resorted to to ascertain the land conveyed. *Mitchell v. Moore*, 13 So. 2d. 314.

Obviously in this case there was a clerical error and one of the "blocks" is error. An investigation of the recorded plat of this subdivision will instantly reveal that, as above stated, the block numbers only run as high as 118; consequently, there could be no "Block 238," but there is a "Block 40." It must be assumed that "Lot 238" was intended. An examination of the file pertaining to this certificate also indicates that the taxes were not paid on lot 238 for the year prior to the year that the tax certificate issued.

The general rule is that a deed is not void for uncertainty (1) if the description is such as will enable a surveyor to ascertain and locate the land or (2) if it is possible to ascertain and identify the land intended to be conveyed.

It is my belief that with the aid of the tax assessment roll and the plat of the subdivision a surveyor could have identified the property with reasonable accuracy, and that the land described in the certificate vested in the state through the operation of the Murphy Act.

September 16, 1946.—046-401.

NONCERTIFICATED LAND—METHOD OF FORECLOSURE

QUESTION: State and county taxes were levied against certain real estate for the years 1936, 1937 and 1938 and do not appear to have been paid. Where the records further fail to show any tax certificates have ever been issued thereon, what procedure should be followed?

To Honorable B. R. Burnsed, Attorney at Law, Macclenny, Florida:

If the taxes were levied against the said property according to law, they are still liens against the property and the failure to issue the tax certificates would not invalidate such liens. See Section 192.21, Florida Statutes, 1941, as amended by the laws of 1943.

The failure to issue the certificates would not affect the lien and under said Section 192.21 such an act of omission could be corrected at any time by the officer or party responsible for same in like manner as is now provided by law for performing such acts in the first place. Also, since the taxes are still liens they may be foreclosed in a variety of methods, none of which is exclusive. See the case of *City of Bradenton v. Lee*, 162 So. 139, and Section 62.36, Florida Statutes, 1941.

Therefore, it would be my advice to you, if the property involved is not of great value and the tax involved is small, to proceed as provided by Section 192.21, as I believe this would be the cheapest way to correct this error. On the other hand, if the property is valuable and the taxes are a considerable amount, I would proceed to foreclose the lien as provided in said Section 62.36 above.

September 5, 1946.—046-381.

TAX REDEMPTIONS—REMITTANCE

QUESTION: Should moneys due individual certificate holders in proration of proceeds of sales of county lands under Section 194.55 (5), 1945 Supplement to Florida Statutes, 1941, be remitted to the office of the state treasurer under the provisions of Section 192.24, Florida Statutes, 1941?

To Honorable J. Edwin Larson, State Treasurer:

Section 192.24, Florida Statutes, 1941, provides, in part and in effect, that whenever there shall have been held by any clerk of the circuit court or other public officer for a period of three months or more any moneys paid in for the redemption of tax certificates, "which moneys are by the course of law provided to be paid over to the holder of a tax certificate redeemed," and as to which said clerk or other officer has not made payment over to the holder, such money, less fees, shall be remitted to the state treasurer who shall hold the same as part of the public funds of the state, subject to the owner thereof being reimbursed with respect to said funds, under the conditions and circumstances therein set forth.

It will be noted that this provision of our statutes was originally Chapter 18313, Laws of Florida, Acts of 1937. Such law was not a part of any other law relating to taxation or distribution of moneys received in connection therewith, but was "an Act to provide for the disposition of unclaimed moneys held by the clerks of the circuit court or other public officers for the account of tax certificate holders to whom such officers are unable to make payment over of the amount paid for redemption of tax certificates within three months."

Section 194.55 (5), 1945 Supplement to Florida Statutes, 1941, deals with the distribution of the proceeds of sales of land acquired by the county in pursuance of the provisions of Section 194.47, 1945 Supplement to Florida Statutes, 1941. Among other features of said Section 194.55 (5) is the provision that "Individually held county tax sale certificates shall participate pro rata in the proportion that the same bear to the lien for general taxes held by the county and municipality; provided, however, that in no event shall such individual tax sales certificates receive an amount in excess of that required to redeem the same, etc."

In view of the foregoing provisions of law, and the apparent intent and purpose thereof, in my opinion the above question properly is answered as follows:

The above question is answered in the affirmative, that is to say, that proceeds distributable to individuals owning county tax certificates upon sale of county lands under said Section 194.55 (5), are to be considered and treated as unclaimed redemption funds as described in said Section 192.24.

March 25, 1946.—046-108.

INTANGIBLE TAXES—MORTGAGES

QUESTION: Are mortgages and other intangibles owned and held by state banks and productive credit associations, in this state, subject to intangible taxes under Chapter 199, Florida Statutes, 1941.

To Honorable Joe Dobson, Clerk of the Circuit Court, Macclenny, Florida:

Section 192.54, Florida Statutes, 1941, provides that state banks are entitled to the same tax exemptions in this state as are national banks. Under title 12, Section 548, of the United States Code, personal property

of national banking associations is exempt from state taxation (51 Am. Jur. 312, Section 258; 61 C. J. 281, Section 272, and annotations under note 43, Section 548, title 12 USCA). Under these provisions it would seem that mortgages and other intangible personal property of banks chartered under the laws of this state are not subject to our intangible tax laws.

Under title 12, Section 1138c, United States Code, the property, funds and other personal property of productive credit associations are not liable to state intangible personal property taxes (*M. G. West Co. v. Johnson*, Cal. App., 66 P. 2d. 1211 (certiorari denied in 302 U. S. 638, 303 U. S. 666, 58 S. Ct. 45 and 525, 82 L. Ed. 497 and 1123); *Martin v. Kenesson*, 274 Ky. 581, 119 S. W. 2d. 644; *Federal Land Bank v. Crosland*, 261 U. S. 374, 43 S. Ct. 385, 67 L. Ed. 703, 29 A. L. R. 1; *McGovern v. Federal Land Bank*, 209 Minn. 403, 296 N. W. 473).

There is an exception in the federal law which permits the taxation of the intangible personal property of productive credit associations after the stock owned by the United States in such associations has been retired.

Subject to the above exception, the above mentioned question should be answered in the negative.

November 22, 1946.—046-477.

ESTATE—INTANGIBLE PERSONAL PROPERTY—DOMICILE

QUESTION: Is the intangible personal property of a decedent subject to taxation at the domicile of said decedent until it has been administered, released and distributed with the approval of the court of original probate even though such property may be held for a portion of that time by an ancillary administrator or executor and in another state?

To Honorable C. M. Gay, State Comptroller:

Under the statutes of this state all personal property actually located in this state and all such property belonging to persons residing in this state is subject to taxation in this state. (Section 192.01, Florida Statutes, 1941.) The statutes recognize that property held by executors and administrators may be assessed in this state in the name of such representative. (Sections 193.19 and 199.07, Florida Statutes, 1941.) Intangible personal property, in contemplation of law, accompanies the person of its owner and is taxable at his domicile, and upon his death such property passes into the custody and control of his personal representative at the domicile of the decedent. Such property is taxable, in the hands of such personal representative, at the domicile of the decedent, or at the place of granting of the letters of administration, which is usually the place of the domicile of the decedent. (1933-1934 Biennial Report of Attorney General, page 57; *State v. Beardsley*, 77 Fla. 803, 82 So. 794, text 795 and 796; see also 61 C. J. 214, 239-240 and 532, Sections 192, 224 and 646; 51 Am. Jur. 414 and 415, Sections 482 and 483; 2 Cooley on Taxation, 4th. Ed. 1054, Section 471; 20 L. R. A. 151; L. R. A. 1915 C 903; 67 A. L. R. 393; 127 A. L. R. 379.)

At first, intangible personal property was subject to taxation only at the domicile of its owner; later, the so-called "commercial" or "business" situs of such property was recognized giving the right of taxation of such property where actively employed or used as an income-producing device; and more recently the right of taxation seems to have been broadened to a point where any state, which affords the intangibles the protection and benefit of its laws, may tax the same. (See *Utah v. Aldrich*, 316 U. S. 174, 62 S. Ct. 1008, 86 L. Ed. 1358 and cases cited therein.) The trend of recent cases seems to be toward the position that the mere domicile of the personal representative will not give the property a situs for property taxation, where he receives his authority solely from

the courts of another state and the property in question is not in his actual possession at his domicile, but is in another state; however, the mere absence of personal property, or the evidence thereof, from the state where the personal representative is domiciled will not prevent its taxation if the decedent was also domiciled there. (See Annotation in 67 A. L. R. 394.) It seems well settled that personal property actually in the hands of an ancillary personal representative may be taxed in the state of such ancillary administration, although neither the decedent nor the heirs or legatees were residents (Annotation 67 A. L. R. 403) and, in one case at least, this was held correct although such property was also taxed at the domicile of the decedent. (*State v. St. Louis County Court*, 47 Mo. 594.)

From the above statutes and authorities, it seems that the above stated question should be answered in the affirmative.

November 1, 1946.—046-461.

MUTUAL BANK ACCOUNT—ASSESSMENT—METHOD

QUESTION: Should a mutual account, for the purpose of assessment for taxes as intangible personal property, be assessed as two running accounts, each consisting of the items charged against the respective parties to the account on his side of the account, or should it be assessed as one account, consisting of the balance to be found by subtracting one side of the account from the other?

To Honorable C. M. Gay, State Comptroller:

Unless expressly exempted from taxation, all property located in this state, and all personal property belonging to persons residing in this state, is subject to taxation (Section 192.01, Florida Statutes, 1941). Personal property includes debts due or to become due from solvent debtors whether on account, contract, note or otherwise (Section 192.03, Florida Statutes, 1941). Indebtedness due on account would constitute intangible personal property under the laws of this state (Sections 199.01 and 199.02, Florida Statutes, 1941) and would appear to be class D intangible personal property within said sections. Mutual accounts belonging to persons or corporations in this state therefore appear to be subject to taxation under the intangible tax laws of this state. Having determined that mutual accounts are subject to taxation under the intangible personal property taxing laws of this state, we are next confronted with the manner of assessment and valuation by the taxing authorities.

As the request for opinion, and the letter and memorandum exhibited with it, relates to mutual accounts and treats the accounts in question as mutual accounts, they will be likewise treated in this opinion. "A mutual account is one based on a course of dealing wherein each party has given credit to the other on the faith of indebtedness to him. Every item on either side ending in a debt is considered a credit in favor of that party pro tanto on a final adjustment, and the several items of credit become converted into payment as to items of debt, so that only the balance is recoverable." (1 C. J. S. 651, Section 18.) A mutual account constitutes but a single cause of action, and that for the balance, and belongs to the person in whose favor the balance is due. (1 C. J. S. 1321, Section 103.) In a mutual account there is but one account in which the items on either side thereof operate to extinguish each other pro tanto, so that the balance on either side is the indebtedness between the parties. (1 Am. Jur. 266 and 267; Ann. Cas. 1913 D 817; 1 C. J. 598 and 599; 27 Words and Phrases 925 and 926; *Gunn v. Gunn*, 74 Ga. 555, 58 Am. Rep. 447; *Hodge v. Manley*, 25 Vt. 210, 60 Am. Dec. 253.) The fact that one of the parties to an account kept one side of the same and the other party the other side is immaterial in determining whether or not such account is a mutual one. (*Lapham v. Kansas and Texas Oil, Gas and Pipe Line Company*, 87 Kan. 65, 123 P. 863.) From these authorities

it appears that a mutual account is but one account and that the balance between the items charged on both sides thereof is the property to be taxed. The items on each side of the account are but parts of one account. (See *Eldridge v. Smith*, 144 Mass. 35, 10 N. E. 717.) The constantly varying balance is the debt. (*Gunn v. Gunn*, supra.)

Section 199.05, Florida Statutes, 1941, provides that "the tax assessor shall assess all intangible personal property at its full cash value." (See also Sections 193.11 and 200.06, Florida Statutes, 1941, which require that other property be assessed at its full cash value.) Under Section 192.03, Florida Statutes, 1941, "for the purpose of taxation 'personal property' shall be construed to include . . . debts due or to become due from solvent debtors whether on account . . . or otherwise." "Debts due or to become due from solvent debtors" refers not to the solvency of the debtor, but to the amount of the debt which may be realized (*Lamar v. Palmer*, 18 Fla. 147, text 155) or the cash value of the debt. Where the debtor is solvent the cash value of the account and its actual amount might well be the same amount.

The first day of January in each tax year being the usual tax day in this state (Sections 192.04 and 199.07, Florida Statutes, 1941), intangible personal property should be assessed as of said day. The full cash value of the balance between the several items on either side of a mutual account, as of the first day of January of any tax year, would seem to be the taxable value to be used for purposes of taxing such account, as the constantly varying balance is the debt to be taxed.

After diligent search we have been unable to find any tax case in this country wherein it was held that the amounts of the two sides of a mutual account was the property to be taxed instead of the balance between such items. Where there is ambiguity or doubt, as to the construction of a taxing statute, such ambiguity or doubt must be resolved in favor of the taxpayer and against the state. (*Lee v. Wood*, 126 Fla. 104, 170 So. 433; *Metropolis Publishing Company v. Lee*, 126 Fla. 107, 170 So. 442; *Lovett v. Lee*, 141 Fla. 395, 193 So. 538; *Lee v. Walgreen Drug Stores*, 151 Fla. 648, 10 So. 2d. 314.)

We must conclude (when we consider the fact that mutual accounts are usually considered as only one account with the constantly varying balance as the debt; that accounts and debts must be assessed at their full cash value, and the debt or cause of action in a mutual account being the balance the value of such mutual account is the value of the balance; that the said balance belongs to the person in whose favor it is due; and that taxing statutes are to be construed in favor of the taxpayer and against the state) that mutual accounts should be assessed as one account, consisting of the balance to be found by subtracting one side of the account from the other. The balance should be assessed for taxes against the person in whose favor it exists, if subject to taxation in this state, who is the owner thereof.

November 13, 1945.—045-355.

NURSERY STOCK—CLASSIFICATION

QUESTION: Is nursery stock taxable and if so, should it be taxed as real or personal property?

To Honorable Jim Burden, County Tax Assessor, Orlando, Florida:

There is some confusion among the authorities as to whether nursery stock should be classified as personal or real property (annotation in 125 A. L. R. 1406-1417). However, the better rule seems to be that nursery stock is personal property (annotation 125 A. L. R. 1406; 27 C. J. 199, Section 139; 41 C. J. 625, Section 601, and 37 C. J. S. 583, Section 75).

The examination of the above cited authorities reveals that the question as to whether or not nursery stock is tangible personal property or a part of the realty is largely one of intention of the respective owners. Where the owner of the land is also the owner of the nursery stock, it seems that he may consider and return the nursery stock for taxation either as a part of the realty or as tangible personal property. Where the nursery stock is assessed as a part of the realty it cannot be assessed also as tangible personal property; and where assessed as tangible personal property it cannot be assessed also as part of the realty. There can be no double assessment.

A former attorney general held that nursery stock was personal property and should be assessed as such (1931-1932 Biennial Report, 687). This opinion is adhered to by me except as above stated where nursery stock may be assessed as a part of the realty when returned as a part thereof by the owner.

In assessing real estate your attention is called to Section 193.20, Florida Statutes, 1941, which provides that "for the purpose of taxation all non-bearing fruit trees shall not be construed as adding any value to said lands."

I am, therefore, of the opinion that nursery stock in the State of Florida should usually be assessed as tangible personal property and usually should not be considered as a part of the real estate. However, the owner of the realty, if also the owner of the nursery stock, may elect to consider the same as part of the realty and return it for taxation as such. Nursery stock should never be assessed both as a part of the realty and as tangible personal property.

July 20, 1945.—045-194.

COUNTY ASSESSOR—ASSESSING REAL PROPERTY

QUESTION: What is the interpretation of Section 192.04, Florida Statutes, 1941, as to the duty of the county tax assessor in assessing real property for ad valorem taxation?

To Honorable Cecil A. Rountree, County Attorney, Chipley, Florida:

I acknowledge receipt of your letter of July 6, 1945, in which you state that a city lot had a dwelling upon it January 1, 1945, which was subsequently destroyed by fire, and you ask whether the value of the dwelling is to be considered and included in the assessment.

In reply to your inquiry I beg leave to state that it is my opinion that Section 192.04, Florida Statutes, 1941, is controlling, and as it fixes the lien of assessments as of January 1, that the valuation should be as of that date and include the house, subsequently destroyed.

July 9, 1946.—046-295.

STOCK IN TRADE VALUE—AVERAGE ASSESSMENT

QUESTION: If a store has a \$25,000.00 inventory at the beginning of January, 1945 and a \$25,000.00 inventory on December 31, 1945, and during the year 1945 the store did a gross business of \$240,000.00 based on an average 40% markup, what in your opinion would constitute an average 100% assessment for the tax year of 1946?

To Honorable John W. Booth, Tax Assessor, Alachua County, Gainesville, Florida:

Section 192.05, Florida Statutes, 1941, reads as follows:

"All personal property considered as goods, wares and merchandise, commonly known as stock in trade, may be assessed for the purpose of taxation by the state, counties, cities, villages, towns and taxing districts at a valuation to be based upon the average value of such stock of goods, wares and merchandise, or stock in trade, as held or owned over a period of twelve months next preceding the first day of January of the year for which the assessment is made."

The stock in trade is covered by the inventory which the business has on hand over a period of twelve months next preceding the first day of January for the year for which the assessment is made. As to what gross business the merchant did during the year is not a criterion in determining what is the average value of his stock during such period. From your question, that is, that he had a \$25,000.00 inventory at the beginning of January, 1945 and a \$25,000.00 inventory on December 31, 1945, would lead me to believe that he had an average inventory of this amount. As I said before, as to what gross business the merchant did during the year is not a formula for determining the average value of his stock in trade during such a year.

Florida has not passed upon this question but our neighboring state of Louisiana has a statute somewhat similar to ours and had before them a somewhat similar question (*Swift and Company v. Board of Assessors*, 38 So. 1006). In that case the merchant had a stock of \$1,500.00, and no more during the year. His sales amounted to \$20,000.00 per month or \$240,000.00 a year. The tax assessor sought to add together the monthly receipts of merchandise during the year and divide that sum by twelve. The court held that this is not the correct formula and the correct formula would be the average amount of stock in trade the merchant had during the year, which was \$1,500.00.

If, therefore, you are satisfied that the average inventory of the stock in trade held by this man is \$25,000.00 in 1945, this should be the formula used by you.

TAX ASSESSMENTS AND SALES

July 10, 1946.—046-297.

EQUALIZATION BOARD—POWERS

QUESTIONS: 1. Can the board of county commissioners raise individual assessments and total roll as well as reduce them if the roll has been submitted to the county tax assessor?

2. Does the board of county commissioners have such power only while sitting as an equalization board?

3. May the county commissioners reconvene at any time as an equalization board?

4. Does the Hillsborough county budget board have authority to raise or lower individual assessments and total roll?

To Honorable Colin English, Superintendent, Department of Education:

Answering your first question, I will state that on August 14, 1945, I rendered an opinion on this question, in which I, among other things, said:

"In my opinion the county board of equalizers is without authority to make assessments or change the value fixed by the county assessor except for the purpose of equalizing assessments and in making such equalization they are limited to the matter of either raising or lowering the value placed on particular properties or otherwise correcting the assessment. The board is without authority to make a general reduction or increase in all the values fixed by the assessor, as this would not equalize the assessments or correct any discrepancies made by the assessor in fixing the value for tax purposes but would be the making of a new assessment by the board. (See opinions of this office reported in the following Biennial Reports: 1933-34, page 140; 1931-32, page 690; 1925-26, page 91; and 1921-22, page 82).

"If in correcting errors the total assessment is reduced or increased in value, then such total increase or decrease would appear to be legal so long as it was not the result of the carrying out of a general scheme to change the basis of assessment established by the assessor."

I am handing you herein a copy of this opinion.

Answering your second and third questions, I quote you a part of an opinion of our supreme court rendered in the case of Sparkman v. State, 71 So. 34, 41:

"Section 23, Chapter 5596, Acts of 1907 (Section 193.25, Florida Statutes, 1941), provides for a meeting of the county commissioners on the first Monday in August or September for the purpose of hearing complaints of valuations fixed by the tax assessor or changed by the commissioners, 'and for that purpose the board may sit as long as it may be necessary.' But in this case the board had sat as long as it deemed necessary, and, there being no complaints, the board adjourned sine die as a board of equalization. The county commissioners have no general power in making tax assessments but only such special and limited power as is specifically conferred by statutes to secure equalization of tax values. When that power, as specially conferred, is exercised, and final adjournment is taken, their special power as a board of equalization ceases, particularly when, as in this case, the power is limited and particular, and in no sense general, as are other powers conferred upon the commissioners with reference to general county matters. Such cases as *Parker v. Evening News Publishing Co.*, 54 Fla. 544, 45 South 309, and *Bowden v. Ricker*, 69 South 694, are not controlling here. In this case it is alleged and admitted by demurrer that there were no complaints for the equalizing board to consider at its statutory meeting in September, and that the board adjourned sine die, and did not undertake to adjourn its sittings to any further day as a board of equalization and review or to hear complaints touching the said assessment roll. The special and limited power to equalize assessments having been exercised, and the duty completed, the statute does not either expressly or impliedly give authority to have a subsequent meeting to change assessments fixed in due course of law."

and I believe that this part of the opinion will answer these two questions.

Answering your fourth question, I can find no special law creating a budget board for Hillsborough county and I assume that there is a budget board in Hillsborough county operating under and by virtue of Chapter 14678, Laws of 1931, and amendments thereto. If I am correct in this assumption, I find no law authorizing the county budget board to raise or lower individual assessments and total roll.

August 6, 1946.—046-336.

EQUALIZATION BOARD—POWER TO ORDER REDUCTIONS

QUESTION: The assessor of taxes of Orange county, Florida, advises that the board of county commissioners sitting as a board of equalization for said county passed a resolution requiring a flat 25% reduction on increases of all valuations of property on Orange avenue in the city of Orlando between Wall and Marks streets over the 1945 assessed valuation; that this reduction was made in order to pacify one certain taxpayer who refused to state the value of his property. May the board of county commissioners sitting as an equalization board take such action?

To Honorable J. M. Lee, State Comptroller:

I gather from the correspondence which you have attached to this request that the property involved comprises ninety-six pieces of which twenty-five pieces had increased valuation because of improvements.

On August 14, 1945, I rendered an opinion in which among other things I said:

"Under the statutes the state comptroller does not act as a tax equalizer approving or disapproving tax rolls or recapitulatory tables, and his approval or disapproval in no way limits the power and authority of the county board of tax equalizers. The statutes seem to contemplate that equalization shall take place after action by the comptroller (see Section 193.29, Florida Statutes, 1941, as amended). The Florida Constitution provides for a county assessor of taxes and assistant county assessor of taxes, whose powers and duties are to be prescribed by law (Sections 6 and 7, Article VIII), but makes no reference to county tax equalization boards, which are purely statutory. Tax assessments in taxing districts or areas are required to be uniform and equal (Section 1, Article IX) so that the burden of every item or parcel of property subject to taxation will bear its just portion of the tax burden (*Lainhart vs. Catts*, 75 Fla. 735, 75 So. 47). The purpose of tax equalization is to bring the assessments on different properties to the same relative standard so that no one will be required to pay a disproportionate part of the tax burden. The power of the county board of tax equalizers is appellate in its nature, as the reviewing agent for actions of the tax assessor in making the assessments.

"Under the statutes the county assessor of taxes is charged with the making of tax assessments. The board of county commissioners is by statute made the county board of tax equalizers (Sections 193.25, et seq., Florida Statutes, 1941). 'County commissioners have no general power in making tax assessments, but only such special and limited power as is especially conferred by statute to secure equalization of tax values.' (*Sparkman vs. State*, 71 Fla. 210, 71 So. 34, text 41). The duty of the board of county commissioners sitting as a county board of tax equalizers is to perfect, review and equalize the tax assessments, and in this connection the board may raise or lower the assessments made on any one or more taxable properties (Section 193.25, Florida Statutes, 1941, as amended).

"In my opinion the county board of equalizers is without authority to make assessments or change the value fixed by the county assessor except for the purpose of equalizing assessments and in making such equalization they are limited to the matter of either raising or lowering the value placed on particular properties or otherwise correcting the assessment. The board is without

authority to make a general reduction or increase in all the values fixed by the assessor, as this would not equalize the assessments or correct any discrepancies made by the assessor in fixing the value for tax purposes but would be the making of a new assessment by the board. (See opinions of this office reported in the following Biennial Reports: 1933-34, page 140; 1931-32, page 690; 1925-26, page 91; and 1921-22, page 82).

"If in correcting errors the total assessment is reduced or increased in value, then such total increase or decrease would appear to be legal so long as it was not the result of the carrying out of a general scheme to change the basis of assessment established by the assessor."

In view of the facts given me and the opinion above written, I feel that the county commissioners are going outside of their authority as an equalization board and are attempting to make a blanket reduction of the valuation of property which under the law they do not have the power to do.

July 10, 1946.—046-304.

PAYMENT OF COMMISSIONS—COUNTY COMMISSIONERS

QUESTION: Are the commissions of the tax assessor for assessing taxes for the general school fund payable by the school board or by the county commissioners?

To Mr. Roger Weaver, County Superintendent of Public Instruction, Inverness, Florida:

In an opinion of January 29, 1942, to the state superintendent of public instruction construing Chapter 17876, Laws of 1937 and Chapter 20936, Laws of 1941, which now appear as Section 193.65 of the Statutes of 1941, I held as follows:

"The payment of commission for assessing and collecting school taxes is also governed by the same statutes. Chapter 17876, Laws of Florida, 1937, and Chapter 20936, Laws of Florida, 1941, both provide that the 'commissions for assessing and for collecting the county taxes shall be audited and paid by the boards of county commissioners of the several counties of this state.' Inasmuch as no special reference is made to county general school fund taxes, these acts contemplate, in my opinion, that commissions for assessing and collecting such taxes must be paid by the boards of county commissioners from funds under their control."

In other words, it appears that the legislature intended the words "county taxes" in this statute to include taxes collected or assessed for the general school fund. These commissions have been paid by the county commissioners for many years by reason of the above statute, and during such time this statute has been repeatedly amended in other respects, thus giving both a departmental and legislative construction over a period of many years, confirming the above interpretation. I adhere to the opinion quoted above, the effect of which is to hold that the commissions of the tax assessor for assessing the taxes for the general school fund are payable by the board of county commissioners and not by the school board.

Section 193.65 was amended in 1943 but made no change whatever in the part of the statute with which this question is concerned.

March 18, 1946.—046-103.

COUNTY OFFICERS—FEES

QUESTION: What are the rights of the tax assessor of Calhoun county, Florida, under the terms of Chapter 22660, Laws of Florida, Acts of 1945, or house bill 499?

To Honorable J. K. Musgrove, Tax Assessor, Blountstown, Florida:

The act in question is a population act applying to counties having a population "of not less than 8200 and not more than 8250 according to the last federal census." According to the federal census of 1940, being the last federal census, Calhoun county had a population of 8218. It is therefore within the population named in the act. The act relates to the compensation of the tax collector, tax assessor and the supervisor of registration.

I will not attempt to advise you as to whether the act in question is constitutional or unconstitutional, as it has not been the policy of this office to pass upon such questions.

It seems to me that under this bill you have a fixed salary of \$2,100.00 per year, payable \$175.00 per month. However, at the end of the year you will make a settlement with the county commissioners and if the fees earned by you under Section 193.65, Florida Statutes, 1941, which appear to include the fees paid by the board of public instruction, are in excess of \$2,100.00, then you should receive the amount of fees in excess of \$2,100.00; however, if the fees do not amount to \$2,100.00, your salary will be the sum of \$2,100.00 and not the amount of the fees.

It may be that the payment of the salary must be provided for in the county budget, either by tax levies or from available county funds not otherwise appropriated.

April 8, 1946.—046-132.

TAX REFUND—BUDGETED

QUESTION: When a tax refund is ordered by the state comptroller, under Section 193.40, Florida Statutes, 1941, who is authorized to make such refund?

To Honorable J. M. Lee, State Comptroller:

Under Section 193.40, Florida Statutes, 1941, the state comptroller is authorized to pass upon and order refunds of tax payments by reason of overpayment and payment where no taxes are due. A double assessment for taxes on the same piece of property would appear to be within the powers of the state comptroller under this section. This same statute provides that when the comptroller orders a refund the board of county commissioners shall comply with the order of the comptroller by providing in the county budget for the ensuing year for the payment of the refund. This provision of the statute seems to answer your question by providing that the county commissioners are authorized to make the refund and when necessary to levy a tax to pay the same.

November 4, 1946.—046-453.

REFUND ON TAX SALES—COUNTY FORECLOSURE

QUESTION: DeSoto county foreclosed, in the year 1943, for delinquent taxes, under the county foreclosure act, on Lots 2, 4 and 6 of the Resubdivision of Block 0 of Mills Addition to Arcadia, Florida. It appears that there is no such legal description but the apparent title thereto was placed in the county by the final decree.

One of the citizens applied to the county to purchase this property, it was advertised for sale, and purchased by him. It then developed that there is no such description existing and the purchaser has asked the county to refund him the \$40.00 paid, plus his costs. Has the county authority to refund this money?

To Honorable John H. Treadwell, Jr., Attorney for the Board of County Commissioners, Arcadia, Florida:

Inasmuch as the county attempted to sell the purchaser property to which it had no title, as the property was never in existence, I think the county not only has the authority to refund this money to the purchaser but in all fairness and justice, it is its duty to do so.

August 8, 1945.—045-230.

COUNTY COMMISSIONERS—ACTING AS EQUALIZATION BOARD

QUESTION: May the board of county commissioners, while sitting as an equalization board to hear complaints in regard to assessed valuation, reduce the assessed valuation of a certain piece of property without increasing the assessed valuation of other property in proportion that same was decreased or lowered?

To Honorable Hugh B. Summers, Clerk of the Circuit Court, Columbia County, Lake City, Florida:

Sections 193.25 and 193.27, Florida Statutes, 1941, give the authority for the board of county commissioners to equalize tax assessments made by the assessor. See also case of Cooley vs. Johnson, 95 Fla. 946, 117 So. 111.

I assume that the county commissioners, acting under their authority, found that the assessed valuation of a certain piece of property was greater than its actual cash value (and they reduced same because of this fact.

I also assume that there are no exceptional circumstances which would require the commissioners to raise any designated sum.

I see no reason or authority in the county commissioners to raise the assessed valuation of other property unless, of course, the county commissioners found and determined the actual cash value of such other property to be higher than the assessment made so as to require the assessed valuation of same to be raised.

August 14, 1945.—045-238.

BLANKET REDUCTION OF VALUATION OF PROPERTY

QUESTION: May a board of county commissioners, when sitting as the county board of tax equalizers, make a blanket reduction of valuation of all taxable property, as shown upon the current tax rolls of their county, after the same have been submitted to and approved by the state comptroller pursuant to Section 193.39, Florida Statutes, 1941, as submitted?

To Honorable Lonnie M. Pearce, Tax Assessor, Columbia County, Lake City, Florida:

Under the statutes the state comptroller does not act as a tax equalizer approving of disapproving tax rolls or recapitulatory tables, and his approval or disapproval in no way limits the power and authority of the county board of tax equalizers. The statutes seem to contemplate that equalization shall take place after action by the comptroller (see Section 193.29, Florida Statutes, 1941, as amended.) The Florida Constitution provides for a county assessor of taxes and assistant county assessor of taxes, whose powers and duties are to be prescribed by law (Sections 6 and 7, Article VIII), but makes no reference to county tax equalization

boards, which are purely statutory. Tax assessments in taxing districts or areas are required to be uniform and equal (Section 1, Article IX), so that the burden of every item or parcel of property subject to taxation will bear its just portion of the tax burden (*Lainhart vs. Catts*, 75 Fla. 735, 75 So. 47). The purpose of tax equalization is to bring the assessments on different properties to the same relative standard so that no one will be required to pay a disproportionate part of the tax burden. The power of the county board of tax equalizers is appellate in its nature, as the reviewing agent for actions of the tax assessor in making the assessments.

Under the statutes the county assessor of taxes is charged with the making of tax assessments. The board of county commissioners is by statute made the county board of tax equalizers (Sections 193.25, et seq., Florida Statutes, 1941). "County commissioners have no general power in making tax assessments, but only such special and limited power as is especially conferred by statute to secure equalization of tax values." (*Sparkman vs. State*, 71 Fla. 210, 71 So. 34, text 41). The duty of the board of county commissioners sitting as a county board of tax equalizers is to perfect, review and equalize the tax assessments, and in this connection the board may raise or lower the assessments made on any one or more taxable properties (Section 193.25, Florida Statutes, 1941, as amended).

In my opinion the county board of equalizers is without authority to make assessments or change the value fixed by the county assessor except for the purpose of equalizing assessments and in making such equalization they are limited to the matter of either raising or lowering the value placed on particular properties or otherwise correcting the assessment. The board is without authority to make a general reduction or increase in all the values fixed by the assessor, as this would not equalize the assessments or correct any discrepancies made by the assessor in fixing the value for tax purposes but would be the making of a new assessment by the board. (See opinions of this office reported in the following Biennial Reports: 1933-34, page 140; 1931-32, page 690; 1925-26, page 91; and 1921-22, page 82).

If in correcting errors the total assessment is reduced or increased in value, then such total increase or decrease would appear to be legal so long as it was not the result of the carrying out of a general scheme to change the basis of assessment established by the assessor.

I am, therefore, of the opinion that your question must be answered in the negative.

April 5, 1946.—046-150.

CURRENT TAX ROLL—DELINQUENCIES

QUESTION: The tax roll is prepared as of January 1 of each and every year; taxes become due on the first day of November of the particular year and are payable until April first of the following year; the tax collector holds his tax sales in June after the taxes have become delinquent on the first of April. Should the current year's tax roll reflect such tax sales, and if so, under the recent changes in the ad valorem tax law whereby certificates are no longer issued by the state, can the following procedure be followed: The tax assessor reflects on the current roll the delinquencies for the previous year, for example, the 1946 roll should reflect 1945 taxes which are delinquent and have 1945 tax certificates against them; about September the tax assessor should take off such delinquent property and take credit for same on the E. & I roll?

To Honorable J. M. Lee, State Comptroller:

In my opinion your procedure is correct and the current year's tax roll should reflect the sales as above set forth. Section 193.71, Florida

Statutes, 1941, referring to errors and insolvencies, it is true, refers to tax sale certificates held by the state. Certificates are no longer issued to the state but, under later acts, issued to the county. I think this section must be read in connection with and as part of such later laws, and should be construed as referring to county certificates.

April 10, 1946.—046-152.

DELINQUENT TAX LISTS

QUESTION: The tax roll is prepared as of January 1 of each and every year; taxes become due on the first day of November of the particular year and are payable until April first of the following year; the tax collector holds his tax sales some time in June after taxes have on the first day of April become delinquent. Should the current year's tax roll reflect such tax sales?

To Honorable James M. Owens, Jr., County Assessor of Taxes, Palm Beach County, West Palm Beach, Florida:

In my opinion your current tax roll should reflect such tax sales and if, as and when they do reflect such tax sales, the following procedure can be followed: The tax assessor having reflected on the current roll the delinquencies for the previous year, for example: The 1946 roll should reflect 1945 taxes which are delinquent and have 1945 tax certificates against them. About September you should take off such delinquent property and take credit for same on the E & I roll.

Section 193.71, Florida Statutes, 1941, referring to errors and insolvencies, it is true, refers to tax sale certificates held by the state. Certificates are no longer issued to the state but under later acts, as you know, are issued to the county. I think this section, 193.71, must be read in connection with and as a part of such later laws, and should be construed as referring to county certificates.

May 15, 1946.—046-210.

SHARES OF STOCK—NONRESIDENT OWNER

QUESTION: Where shares of the capital stock of a state banking institution, organized under the laws of this state, are owned and held by an alien or nonresident of this state, are such shares of stock subject to taxation under the laws of this state?

To Honorable J. M. Lee, State Comptroller:

Unless shares of the capital stock of a domestic banking or other corporation have acquired a business status in this state (Starkey v. Carson, 138 Fla. 311, 189 So. 385; 51 Am. Jur. 502, Section 493; 61 C. J. 233, Section 217), or the legislature has annexed, as an incident to the granting of the corporate franchise, the right of taxation in this state (61 C. J. 231, Section 214; 51 Am. Jur. 501, Section 492; 3 Cooley on Taxation, 4th Ed. 1960, Section 973), shares of stock, in domestic corporations, owned and held by nonresidents, follow the person of their owner for purposes of taxation and have a situs for taxation at his place of residence and not in this state (61 C. J. 231, Section 214; 51 Am. Jur. 501, Section 492; 3 Cooley on Taxation, 4th Ed. 1960, Section 973).

Section 193.08, Florida Statutes, 1941, does not appear to have been intended as a limitation on the granting of a corporate franchise in this state and the making of the taxation of the shares of its stock a condition attached to such franchise.

Residents of the territories of the United States are not aliens and should be considered merely as nonresidents of this state. The status of such residents is no different from that of residents of other states.

It, therefore, appears that the above question should be answered in the negative.

June 7, 1946.—046-247.

MURPHY ACT LAND—DUTY OF ASSESSOR

QUESTION: The North St. Lucie River Drainage District foreclosed for nonpayment of drainage taxes on a number of parcels of land on which the state owns title under the Murphy Act. The North St. Lucie River Drainage District made a return on the 1945 tax roll and now they are paying their taxes and asking that these parcels be cut out and assessed back to the state and are refusing to make a return on 1946 tax roll except as to parcels that have been purchased by individuals from the state who have not purchased from the drainage district. What are the duties of the assessor?

To Honorable E. R. Pierce, Tax Assessor, St. Lucie County, Ft. Pierce, Florida:

I have been furnished with further information by you that the final decree in the said foreclosure suit is dated July 11, 1944, so I assume that all the proceedings in this case were had and taken after June 9, 1939, when the Murphy Act went into effect.

I assume that the State of Florida did not give its consent to be sued in the said foreclosure proceedings.

In the case of the Trustees of the Internal Improvement Fund, et al v. Southwest Tampa Storm Sewer Drainage District, 142 Fed. 2d. 637, syllabus 1, it says:

"Under Florida law state had legal title to lands forfeited for delinquent unredeemed state tax certificates which were more than two years old on June 9, 1937 and state's lien under such certificates merged in state's fee simple title."

Syllabus 2 says:

"The title which vests in the State of Florida under state statute vesting in state fee simple title to lands forfeited to state for nonpayment of state taxes is subject to lien of drainage district taxes but such liens remain unenforceable so long as lands are owned by state."

Following the line of reasoning in this case, as long as the state holds title to the land under the Murphy Act, the drainage taxes are unenforceable.

It would necessarily follow therefore that the foreclosure suit was ineffectual to divest the state of its title.

Section 193.21, Florida Statutes, 1941, says:

"The county tax assessor shall in all cases where land has not been returned for assessment on or before the first day of April of each year, as required by law, assess such land not returned for taxation in the name of the last known owner, provided that an erroneous statement of the name of the owner of such land or entry on the assessment roll shall not invalidate the assessment."

Since the Murphy Act vested the title in the state (which law as you know has been held valid by our supreme court in numerous cases) I think it would be your duty to assess the title either in the state by virtue of Section 193.21, Florida Statutes, 1941, or as "unknown" as provided in Section 193.20, Florida Statutes, 1941.

I am not unmindful of the fact that where you assessed the land to the state or "unknown" you get no fee, and this works a hardship on you and other assessors similarly situated.

June 9, 1945.—045-143.

CANCELLATION OF TAX CERTIFICATES

QUESTION: Does the payment of taxes for 1933, 1934, 1935, 1936 and 1937 prior to July 1, 1939, authorize the cancellation of a tax certificate of 1931 for 1930 taxes pursuant to Chapter 20981, Acts of 1941?

To Honorable F. C. Elliot, Secretary, Trustees of the Internal Improvement Fund:

The Futch Act (Chapter 16252, Acts of 1933) had the effect of suspending or freezing state-held tax certificates issued in 1931 and prior years for fifteen years, if the taxes for the years 1932 through 1936 were paid before July 1, 1937. Chapter 20981, Acts of 1941, provided for the cancellation of such certificates frozen under the Futch Act. The 1932 taxes in the situation before us, however, were not paid and this eliminates from our consideration the applicability of the first or original Futch Act.

By the amendment to the Futch Act (Chapter 17400, Acts of 1935) it was required that the taxes for 1934 through 1938 be paid prior to July 1, 1939, as a condition precedent to the freezing of state-held tax certificates for the year 1933 and prior years, but in this case the 1938 taxes were not paid and the land was sold for taxes in 1939. Thus the amendment to the Futch Act was inapplicable.

Since the 1931 certificate was not frozen under either act, the title to this land vested in the state, and was not subject to cancellation.

A former opinion of this office at first might seem to conflict with the view here expressed, but an examination of that file showed that a set of facts not present here prevailed in the former situation.

September 21, 1946.—046-393.

TAX ROLL—PROPERTY IN LITIGATION

QUESTION: Can the board of county commissioners of your county legally certify and approve the 1946 tax roll as to the property on which no changes were made by the board of equalization while litigation is pending as to approximately 92 pieces of property on which the board of equalization made changes?

To Messrs. Fishback, Smith & Williams, Orlando, Florida:

In my opinion, it would not be proper to attempt to certify and approve such a partial tax roll.

Section 193.29, Florida Statutes, 1941, says that immediately after the assessment roll has been reviewed and equalized by the county commissioners, and the amount to be raised for all tax purposes determined, the county assessor of taxes shall calculate and carry out the total amount of such taxes, setting down opposite to the aggregate sum set down as the valuation of real and personal estate the respective sums assessed as taxes thereon, etc.

I do not see how the tax assessor could determine such totals on a partial tax roll. Neither do I see how in the absence of such totals the county commissioners could set the correct millage which under the law they are required so to do.

In my opinion, it would lead to the utmost confusion.

I recognize the fact that because of pending litigation the collection of the taxes may be delayed but I see no way of avoiding this.

TAX SALE CERTIFICATES AND TAX DEEDS

April 1, 1946.—046-126.

COUNTY TAX LANDS—METHOD OF SALE

QUESTION: Chapter 22079, Laws of Florida, 1943, Section 21, provides a method of sale of land which reverts to the county for the non-payment of taxes. May a description be divided to meet a request by an applicant, or are the county commissioners limited to sale by the grouping of such lands as appears on the assessment rolls?

To Honorable Jess Mathas, Clerk of Circuit Court, Volusia County, DeLand, Florida:

In this connection I desire to call your attention to Chapters 22772 and 22870, Laws of Florida, 1945, which are later laws on the subject.

Chapter 22772, Section 1, Subsection (1), says:

"The board of county commissioners shall, within ninety days after the entry of decree provided in §194.47, determine the price of each parcel of such land, which price shall be not less than fifty per cent of the amount of the last assessed valuation appearing upon the county tax roll; and in performance of this duty said board of county commissioners are empowered to incur necessary expense in obtaining expert appraisals and information to assist them in determining such price."

If the subdivision aforesaid is located in a municipality, Section 1 of said act also requires certain duties of the municipal officers with respect to determining the sales price.

In my opinion, this gives the county commissioners ample authority to sell the land in such parcels as they feel will be for the best interest of the county; and they are not limited to the grouping of such land as appears on the assessment roll. In other words, if lots 8, 9, 10 and 11, block B of a certain subdivision should appear in one assessment and one certificate issued, I do not think the county commissioners would be limited to fixing a price and selling these four lots together.

Of course, the price shall not be less than fifty per cent of the last assessed valuation appearing upon the county tax roll.

The county commissioners have ample authority to incur the necessary expense in obtaining the information necessary to determine such price.

July 12, 1946.—046-299.

COUNTY LAND—WITHDRAWAL FROM SALE

QUESTION: Under and by virtue of Section 194.55, Florida Statutes, 1941, as amended by the Laws of Florida, 1945, the county offered for sale certain land in Volusia county; upon the same being offered for sale the city of DeLand entered its bid for same; the county of Volusia now desires to withdraw the said land from sale and dedicate it to public use; the said county has also received a communication from the city of DeLand asking that the property be withdrawn from sale. Under these circumstances can the county withdraw land from sale regardless of that part of the law reading as follows:

"The person making a deposit in order to have a parcel of land advertised for sale shall not be permitted to withdraw his bid or his deposit from the clerk unless he is not the highest bidder at the sale in which event his deposit is to be refunded to him by the clerk?"

To Honorable Jess Mathas, Clerk of the Circuit Court, Volusia County, DeLand, Florida:

As I understand your question, the county of Volusia seeks to have the property withdrawn from sale and not the person, the city, who made the bid. If I am correct in this, I know of no reason why the county commissioners of the county of Volusia could not withdraw the property from sale.

November 23, 1946.—046-475.

SALE AT PUBLIC AUCTION—REOPENING BIDDING

QUESTION: Mr. W. C. Durrance of Fort Meade, Florida, had posted a bid of \$2,010.00 to purchase Block N, Lot 1 W $\frac{1}{2}$ of E $\frac{1}{2}$, Dzialynski's Add., 27-31-25. Before the sale which I began promptly at 11:00 on the above date Mr. Fordren Mitchell of Thomasville, Georgia and Fort Meade, Florida, made inquiry in the office regarding the above description on which he stated he wished to bid. At the sale the description was called out and sold to Mr. Durrance. I completed the sale of one other piece of property and had just started to sell the second piece when Mr. Mitchell came up and and stated that he had not understood that the above description had been sold because he had wished to bid on it. Mr. Durrance was still present and there were quite a number of pieces of property still unsold. I asked Mr. Durrance if he would be willing that the property be re-sold and he stated that he considered that he had purchased the property and that the sale should not be re-opened. I decided that under the circumstances since both parties were present I would re-open the bidding which I did. While Mr. Durrance did not agree to the re-opening of the bidding he raised his bid several times and each time Mr. Mitchell over bid with the result that the property was resold to Mr. Mitchell for \$3,000.00.

Should I issue a deed to Mr. Durrance for \$2,010.00 or issue a deed to Mr. Mitchell for \$3,000.00?

To Honorable D. H. Sloan, Jr., Clerk Circuit Court, Polk County, Bartow, Florida:

In my opinion, it was well within your discretion to put the property up for auction the second time. These auctions are made public for the purpose of getting as much money as can be obtained by bona fide bids. Furthermore, I suspect that Mr. Durrance, in participating in the second bidding, waived any right he might have to demand a deed based on the first bid.

In my opinion, it is your duty to make the deed to Mr. Mitchell, the highest and best bidder for the property.

September 17, 1946.—046-411.

REAL ESTATE LIENS—RELEASE BY COUNTY

QUESTION: Do boards of county commissioners in this state have power and authority to release real estate from the lien of judgment entered pursuant to forfeiture proceedings upon estreated criminal bail bonds?

To Honorable J. M. Lee, State Comptroller:

The above question appears to be presented by reason of the existence of such a judgment in Hillsborough county and the lien thereof against a certain parcel of land which was also sold for delinquent taxes, assessed and levied subsequent to the entry of the said judgment, and the vesting of the title to said delinquent tax lands in Hillsborough county

pursuant to court proceedings under Section 194.47, Florida Statutes, 1941, as amended. After sale by the county, pursuant to Section 194.55, the purchaser discovered the existence of the judgment and now wishes to clear up the title to his lands.

Tax liens and judgment liens in this state are creatures of statute and neither become a lien unless made so by statute. (*State v. Culbreath*, 140 Fla. 634, 192 So. 814, text 818; *Protective Holding Corporation v. Cornwall Company*, 127 Fla. 252, 173 So. 804, text 812.) While the statutes provide that the lien for county taxes is "a first lien superior to all other liens on any property against which such taxes have been assessed" (Section 192.21, Florida Statutes, 1941, as amended), it merely provides that a judgment "shall become a lien on the real estate of the defendant" (Section 55.10, Florida Statutes, 1941). In the above court proceedings under Section 194.47, Florida Statutes, 1941, as amended, the fee simple title to the lands became "absolutely vested in said county" and, under Section 194.53, Florida Statutes, 1941, as amended, "all rights, titles, interests in, or liens upon said property, except liens for general taxes . . . shall be cut off and extinguished." It, therefore, appears that there is grave doubt as to the further existence of the judgment lien after the county became vested with title to the lands and conveyed the same as aforesaid.

Compromises and settlements of claims owing to the county are generally upheld by the courts in the absence of a showing of fraud or collusion, provided the compromise is made by the county board rather than by some county official. (20 C. J. S. 1114, Section 233; 15 C. J. 586, Section 287.) County commissioners in this state have been held to have authority to compromise and settle judgment upon estreated bonds and to satisfy the same of record. (1941-42 Biennial Report, page 135.) However, it seems that the state comptroller has no such power (1939-40 Biennial Report, page 529), although the judgment is in the name of the state for the use and benefit of the county (Section 142.03, Florida Statutes, 1941). The proceeds from such judgments are required to be paid into the fines and forfeiture fund of the county, thereby becoming county funds. (Section 142.03, Florida Statutes, 1941.) The county is the real party in interest and the state is a mere nominal or formal party to the judgment. If county commissioners have authority to compromise and settle such judgments and satisfy them of record, it seems that they also have authority to give releases of the lien of such judgments upon certain parcels of land upon such terms as they think proper. They may, in cases like the instant one, take into consideration the question of the possible priority of other liens upon the same parcel of land in making settlement and releasing such lien.

I am, therefore, of the opinion that the above question should be answered in the affirmative.

April 5, 1946.—046-136.

RECORD TITLE HOLDER—RECONVEYANCE

QUESTION: Can a party in possession of certain property on the date Chapter 22870, Acts of 1945, become a law, but who did not have title on record on the date the title to such lands became quieted in the county, have such land conveyed back by the county under said law?

To Honorable D. H. Sloan, Jr., Clerk of the Circuit Court, Polk County, Bartow, Florida:

Chapter 22870, Laws of Florida, 1945, says:

"Lands acquired prior to January 1, 1946 by any county of the state for delinquent taxes under the provisions of chapter 22079, Acts of the Legislature, 1943; . . . may in the discretion of the board of county commissioners be conveyed by said board to

the record fee simple owner of such lands as of the date of the final decree whereby the title to such lands became quieted in the county."

In my opinion only those fee simple owners whose deeds were of record at the date of said final decree can take advantage of this section.

I realize that in some cases this will work a hardship but the legislature specifically designated only "record fee simple title" owners who could take advantage of this law. In doing so the legislature, I am sure, had a specific purpose in mind and that was to give the county commissioners definite instructions as to who would be entitled to the provisions of the law thereby eliminating any question of bad faith, and taking from the commissioners the duty of determining any questions of possession.

January 19, 1946.—046-26.

COUNTY COMMISSIONERS—DISPOSITION OF REAL PROPERTY

QUESTION: Can the county convey a part of certain lands which were conveyed to it for the purpose of being used in connection with the location of a site and the erection of a court house for Hendry County?

To Honorable H. A. Rider, County Attorney, Hendry County, LaBelle, Florida:

This question has been answered by the Supreme Court of Florida in the case of Gessner et al. v. Del-Air Corporation, 17 So. 2d. 522. In that case the Supreme Court of Florida says:

"County commissioners have only such powers as are granted them by statute and the Constitution, and where there is doubt as to the existence of authority it should not be assumed. F. S. A. §125.01; F. S. A. Const. art. 8, §5.

"County commissioners did not have power to dispose of real property no longer needed or used for county purposes. F. S. A. §125.01; F. S. A. Const. art. 8 §5.

"Ordinarily, a county cannot, without legislative authority, dispose of real property after it has been acquired and devoted to public service."

The legislature of 1945 gave authority to the board of county commissioners to convey certain tax forfeited lands (see Chapter 22870, Laws of 1945) but the lands you mention do not fall in this category.

I assume there is no special law applicable to Hendry county.

February 7, 1946.—046-49.

TIME FOR SALE—ADJOURNMENT

QUESTION: Where a sale pursuant to Section 194.55, Florida Statutes, 1941, as amended, which provides that sales of delinquent tax lands of the county "may be held. . . . between the hours of 11 A. M. and 2 P. M." of the day of sale, is begun at 11 A. M. and all the advertised parcels are not sold by 2 P. M., may sales continue on the same day until completed or should the sale be adjourned at 2 P. M. until 11 A. M. of the next day?

To Honorable Ted Cabot, Clerk of the Circuit Court, Ft. Lauderdale, Florida:

As a general rule the officer holding a legal sale has power to postpone or adjourn the sale, except in so far as it is limited by statute. Whether or not the sale is to be postponed or adjourned rests in the

discretion of the officer; but this is a legal discretion to be justified by the exigencies of the situation and not an arbitrary preference. It should be exercised with impartial regard as to the interests of all parties concerned. Although the sale should begin at the hour appointed, the fact that the sale continues beyond the hour fixed by law therefor is not usually grounds for objection where it appears that no one is prejudiced thereby. (23 C. J. 627 and 628, Sections 589 and 590; 35 C. J. 35, Section 46.)

Although I am of the opinion that the sale may be continued beyond the hour of 2 o'clock where no one will be prejudiced thereby, the person holding the sale should make all effort to complete the same before 2 o'clock and if not completed by 2 o'clock he may either continue with the sale for a reasonable length of time or adjourn the same until 11 o'clock the following day, as in his opinion the exigencies of the case require. This opinion is confined to sales under Section 194.55, Florida Statutes, 1941, as amended, only and should not be applied to other sales.

February 6, 1946.—046-48.

TAX DEEDS—ISSUANCE—FORMS USED

QUESTION: Where application is made for tax deed to be based upon county tax sale certificates (no state taxes being involved) and the clerk of the circuit court, to whom application is made, uses the form prescribed by Section 10, Chapter 17457, Acts of 1935, for state tax deeds, instead of the form prescribed by Section 194.24, Florida Statutes, 1941, for county tax deeds, what is the effect of such deeds and what is the duty and authority of the clerk to correct his error?

To Honorable R. R. Saunders, Attorney for the Clerk of the Circuit Court, Ft. Lauderdale, Florida:

The tax deed prescribed by Section 10, Chapter 17457, Laws of Florida, Acts of 1935, is from the **State of Florida**, while the one prescribed by Section 194.24, Florida Statutes, 1941, is from the **County**. The one from the state was designed to convey title based upon tax certificates issued in the name of the state, while the one from the county was designed to convey title based upon tax certificates issued in the name of the county. If there were involved both state and county tax sale certificates in an application for tax deed, it may be that either form might be used, but where there are no state tax sale certificates involved, I think that the use of the 1935 form was improper and the attempted deed may be void. Although I am of the opinion that only a substantial compliance with the form prescribed by the statute for tax deed is required (*Smith v. Philips*, 51 Fla. 327, 41 So. 527), I think the use of a state deed form when a county form is required is not a substantial compliance with the statute.

You make a suggestion in your letter that the governor request an advisory opinion of the supreme court. It does not appear that this is such a matter as will authorize the governor to request an advisory opinion under the constitution and the court usually will not render an advisory opinion unless it is within the constitution.

It seems to be a general rule that where a power is vested in an officer to execute a tax deed, such power is not exhausted until a deed is made in compliance with the law, and the making of an insufficient deed does not exhaust his power where the facts existed upon which a valid deed may be made. If he refuses to issue a second deed he may be compelled to do so by mandamus (61 C. J. 1333, 1362 and 1363, Sections 1870, 1933, 1934 and 1935; 51 Am. Jur. 946, Section 1087).

Although I am of the opinion that a duty rests upon the clerk of the circuit court to issue a second and corrected tax deed; I am of the opinion that it would be advisable that a proceeding be brought against

the clerk to direct that such a corrected deed be issued. If possible, the proceeding should involve both a deed issued by the present clerk and one issued by the former clerk so as to test the duty of the present clerk to correct deeds issued by the former clerk. Doubtless you know of someone who holds one or more of the erroneous deeds who would permit the use of his name as plaintiff in such a proceeding. The question seems to be such as would justify the supreme court in assuming original jurisdiction of the cause, and there being no issues of fact the same might be handled in the supreme court on briefs without oral argument.

August 8, 1945.—045-229.

MURPHY LANDS—TAX DEEDS

QUESTIONS: 1. When the holder of a 1941 tax sale certificate applies for a tax deed, should a tax certificate on the same land be redeemed which was purchased by an individual pursuant to the terms of the Murphy Act?

2. In the case of a suit to foreclose a tax sale certificate, instead of the above tax deed application, should the Murphy Act tax certificate be redeemed?

To Honorable Leslie R. Avant, Clerk of the Circuit Court, Arcadia, Florida:

This is to advise you that under the provisions of Section 194.15, Florida Statutes, 1941, an individual holding a tax sale certificate of the sale of 1941, may obtain a tax deed by filing the certificate with the clerk of the circuit court and notifying such officer that he desires the land described therein advertised for sale. Such section requires the certificate holder to pay to the clerk the proper amount fixed by law for the redemption or purchase of all other outstanding tax certificates covering said lands. It is my conclusion, after an examination of the law and the decisions of our supreme court, that this includes tax certificates purchased by individuals in accordance with the provisions of the Murphy Act (Chapter 18296, Acts of 1937).

In answer to your second question, it is my additional belief that in foreclosure proceedings the holder of the 1941 certificate must redeem or purchase a tax certificate acquired by an individual under the Murphy Act.

September 1, 1945.—045-276.

EVERGLADES DRAINAGE DISTRICT

QUESTION: Are tax deeds, based upon state and county tax certificates and issued upon lands theretofore forfeited to the Everglades Drainage District for nonpayment of taxes, superior to conveyance subsequently given by the Everglades Drainage District?

To Honorable Ted Cabot, Clerk of the Circuit Court, Broward County, Fort Lauderdale, Florida:

The facts appear to be that by virtue of Section 15, Chapter 20658, Acts 1941, the title to certain property vested in the Board of Commissioners of the Everglades Drainage District; that subsequently state and county tax sale certificate holders obtained tax deeds to the same land, and that thereafter the Everglades Drainage District gave conveyances embracing the same property to other grantees.

It is my belief that the situation presented here is controlled by the decision of *Smith v. City of Arcadia*, 2 So. 2d. 725. There, after a municipality had prosecuted its tax lien foreclosure suit to final decree, bought in the lands and had taken a master's deed to the same, a holder of state and county tax sale certificates caused an advertisement to be made for

tax deed and acquired a deed conveying the lands to her. The court held that the title which had vested in the city was not absolute but was subject to defeasance by enforcement of the then existing liens for state and county taxes, and it was the duty of the municipality, as the purchaser of a new and independent title as city foreclosure sale, to redeem from state and county tax liens. See also *Trustees, Etc. v. Southwest Tampa Storm Sewer D. Dist.*, 142 Fed. 2d. 637.

It is my opinion that the board of commissioners, having received its title to the land herein subject to the lien of state and county taxes and having the same right to redeem as any other owner, in failing to redeem the state and county tax certificates filed with the clerk of the circuit court before auction of the property by the clerk, suffered its title to become extinguished. The deeds afterwards given by the board, therefore, conveyed no interest in the property.

May 20, 1946.—046-212.

RIGHT TO RECLAIM—DAUGHTER

QUESTION: May a daughter of the owner of real estate redeem delinquent taxes should the personal representative fail to do so?

To Honorable R. E. Davis, Clerk of the Circuit Court, Trenton, Florida:

Under the general law, any person having an interest in the real estate encumbered by a tax sale certificate, whether equitable or legal, may redeem such tax sale certificate (61 C. J. 1245-1248, Section 1690-1694; 51 Am. Jur. 959-961, Sections 1106-1110). Children of the owner have been recognized as having a right to redeem tax sale certificates encumbering the lands of their parents (61 C. J. 1245, Section 1690, note 62).

I am, therefore, of the opinion that a daughter of the owner of property has a right to redeem outstanding tax sale certificates where the personal representative fails to do so. The above question should be answered in the affirmative.

November 6, 1946.—046-450.

HARDSHIP STATUTE—COUNTY COMMISSIONER—DUTIES

QUESTION: In the foreclosure suit instituted by DeSoto county in 1944 was included a parcel of land, the title to which at that time was vested in the city of Arcadia. The city failed to furnish the board of county commissioners or the clerk of the court with a statement showing its ownership of this property and we were not advised of the fact that the city owned it.

The city has now filed a petition under the hardship statute of 1945, asking that the property be deeded to it upon payment of the amount originally due the county for taxes and costs of the clerk.

Have the county commissioners the authority under the "Hardship Statute" to let the city reacquire the property?

To Honorable John H. Treadwell, Jr., Attorney, for the Board of County Commissioners, DeSoto County, Arcadia, Florida:

The so-called "Hardship Statute" which is Chapter 22870, Laws of 1943, now numbered Section 194.47—1 and 2, Florida Statutes, 1941, makes it optional with the county commissioners whether to reconvey to the owner the property acquired by the said county. In that law it is provided:

"Upon the filing of the petition or statement provided for in Section 194.47—1, the board of county commissioners shall consider the same and should it appear to the satisfaction of the said board that the property constituted the homestead of the petitioner or that the petitioner was engaged in the armed services of the United States at the time the described land reverted to the county, or should it appear that a failure to approve said petition would work a severe hardship on the petitioner, the said board, in its discretion, may approve or disapprove the same."

It will be seen from this act that it is within the discretion of the county commissioners to approve or disapprove the petition of the city of Arcadia, even if the city could be in possession to prove it is entitled to come under the said "Hardship Statute."

As to what right the city may have under any other law has not been considered by me in the absence of sufficient facts and a specific request for an opinion thereon.

July 31, 1946.—046-329.

HARDSHIP STATUTE—PROOF OF OWNERSHIP

QUESTION: In March 1936 Charles I. Dwiggins as receiver of the Polk County National Bank in Bartow, Florida, conveyed by fee simple deed to Meekey Stone (Mrs. Norman Stone) SW $\frac{1}{4}$ of NE $\frac{1}{4}$, 20-30-28 and on the same date Meekey Stone gave Mr. Dwiggins in the capacity as listed above a purchase money mortgage on this land. While the mortgage was recorded April 20th, 1936, the deed through inadvertance was not recorded. The mortgage was assigned and satisfied but neither of these instruments have been recorded. Some taxes were paid by Mrs. Stone after the purchase. Under the circumstances would the evidence of ownership as presented be sufficient to offset the fact that the purchaser did not actually record the deed and would Mrs. Stone at this time be permitted to take advantage of Chapter 22870, Laws of Florida, 1945, commonly known as the "Hardship Statute"?

To Honorable D. H. Sloan, Jr., Clerk of the Circuit Court, Polk County, Bartow, Florida:

On April 5, 1946, I rendered an opinion on this same chapter wherein I held that a party who was in possession of her property when this chapter was passed but did not have on record her title to the property on the date the title to such lands became quieted in the county, could not take advantage of this section; that while it would work a hardship in certain instances, the legislature has specifically designated only "record fee simple title" owners to take advantage of this law; that in doing so the legislature had a specific purpose in mind and that was to give the county commissioners definite instructions as to who would be entitled to the provisions of the law, thereby eliminating any question of bad faith and taking from the commissioners the duty of determining questions of possession.

I cannot see where in the instant case the fact that Mrs. Stone had given back a purchase money mortgage on certain property would be evidence that she had a record fee simple title to the said property. It is possible that she might give a purchase money mortgage for certain property and at the same time not have the fee simple title to same.

In my opinion, the legislature meant just what it said that those who can take advantage of this law must be record fee simple owners as of the day of the final decree. I do not think that Mrs. Stone was such an owner so that she might take advantage of this law.

September 10, 1945.—045-284.

PROPERTY REPURCHASED UNDER THE "HARDSHIP BILL"

QUESTION: Where an original owner has lost his property under the county foreclosure suit and repurchases it under the so-called "Hardship Bill," or at public auction, are the liens which existed before the property reverted to the county wiped out or not?

To Honorable Ray E. Green, President, Association of County Clerks, St. Petersburg, Florida:

The foreclosure suit which you mentioned is designated in Chapter 22079, Acts of 1943, and the so-called "Hardship Act" is Chapter 22870, Acts of 1945.

If the liens which you mentioned as having existed prior to the property's reverting to the county are those which the owner was under obligation to pay, then I do not think that such liens are cancelled but are revived by reacquisition of the title by the owner under the so-called "Hardship Bill."

I am aware of the fact that under the said county foreclosure suit, Paragraph 19 thereof, which is now Section 194.53, Florida Statutes, 1941, that the title acquired by the county is a new and original title subject only to such liens for general taxes of equal dignity to county liens for general taxes, etc.

In the case of *Torreyson, et al. v. Dunn, et al.*, 188 So. 805, a similar question was before the court. In that case the owner of the property had by his mortgage agreed to pay the taxes on the said property. He failed to do this and a tax certificate covering said land was purchased. A suit was brought by the said tax certificate holder and the assignee of the mortgagee was made a party defendant. The suit resulted in a decree in favor of the tax certificate holder and master's deed was executed to him. Afterwards the land was conveyed by the purchaser, the certificate holder, to the former owner of the property. In a suit brought by *Torreyson*, the assignee of the mortgage which was involved in the tax foreclosure suit, the original owner claimed that in the tax foreclosure suit, the lien of the mortgage was cancelled. The court held that while a new and independent title resulted from the foreclosure of the tax sale certificate such new and independent title became ineffectual when the title again became vested in the mortgagor whose mortgage remained outstanding and unsatisfied and that the encumbrance was revived by such a reacquisition of the title.

I think the ruling in this case is broad enough to cover any lien which the owner was under obligation to pay and that the said liens are revived when the owner reacquires the title under the so-called "Hardship Bill."

It would shock my sense of right and justice to hold otherwise, for I do not think the legislature, in trying to help owners to reacquire the title under the so-called "Hardship Bill," had in mind giving owners a means of avoiding their just obligations.

October 21, 1946.—046-437.

COUNTY TAX DEED—PURCHASE

QUESTION: On January 9, 1940 the county of Volusia acquired title to certain real estate in that county for the purpose of a shell pit. The state and county taxes for the year 1940 were not paid and thereafter tax certificate was issued by the tax collector for these unpaid taxes and at the tax sale in 1941 the property was sold to the state. By virtue of Section 194.47, Florida Statutes, 1941, the county instituted a suit

based on the said tax certificate and the property was therein decreed to be the property of the county. Unmindful of this, the county, under Chapter 23593, Special Acts of 1945, advertised the property for sale and it was bid in by a purchaser for \$1,200. The purchaser afterwards discovered that the said suit had been brought under Section 194.47 and he demanded that the county advertise the property as provided by Section 194.55, Florida Statutes, 1941, which was done, and this same purchaser bid on the property \$1,550. The said purchaser is willing to pay this \$1,550. Would it be legal under these circumstances for the county to sell the property to this purchaser based upon the said notice last aforesaid for \$1,550, in spite of the fact that in the said suit brought under Section 194.47, Florida Statutes, 1941, the county was in effect quieting title to its own property?

To Honorable Jess Mathas, Clerk of Circuit Court, Volusia County, DeLand, Florida:

I do not decide whether the county could give a better title under the sale as set forth in said Chapter 23593, Special Acts of 1945, or under the sale as set forth in Section 194.55, Florida Statutes, 1941, as the purchaser has already decided this question for himself and has decided he would rather have the title based on the proceedings as set forth in Section 194.47, Florida Statutes, 1941.

I see no reason why the county commissioners cannot sell this property for the price of \$1,550 and make a deed in accordance with said Section 194.55, in which case, however, the proceeds of the sale must be distributed as provided in Section 194.55.

March 16, 1945.—045-68.

TAX DEED—ISSUANCE TO THE HIGHEST BIDDER

QUESTION: Should the clerk of the circuit court comply with the demand of the highest bidder at a sale of lands for nonpayment of taxes that the tax deed be issued to the nominee of said highest bidder?

To Honorable J. R. Pomeroy, Clerk of the Circuit Court, Martin County, Stuart, Florida:

For the purposes of this opinion, I am assuming that the sale in question was held under Section 194.15 et seq., Florida Statutes, 1941.

Section 194.21, Florida Statutes, 1941, provides that the property shall be struck off and sold to the "highest bidder."

Section 194.24, Florida Statutes, 1941, prescribes that the clerk shall cause the tax deed to be "issued to the highest bidder at the sale." The form of the deed set out in said section recites that the lands were "struck off and sold to, he being the highest bidder for the same" and in the granting part of said deed form is a blank line for the insertion of the name of the highest bidder.

I find no case in which the Supreme Court of Florida has construed the above quoted statutory provisions, and there appears to be no statute authorizing a tax deed to be made to anyone other than the highest bidder at the sale.

Therefore, I suggest that you strictly follow the terms of the statute unless you should be required to do otherwise by a court of competent jurisdiction. No substantial injury can result to anyone from pursuing this course, as the highest bidder can convey the lands to whomsoever he desires as soon as he receives his tax deed.

February 28, 1945.—045-60.

EXEMPTION INVOKING OPERATION OF FUTCH ACT

QUESTION: Does the statutory tax exemption to one disabled by misfortune cause a 1933 tax certificate to be held by the State pursuant to the Futch Act, as amended?

To Honorable F. C. Elliot, Secretary, Trustees of the Internal Improvement Fund:

An investigation of the correspondence file appened to your letter will dislose that there were delinquent taxes on certain property for the year 1932; that in 1933 the owner thereof became confined to the state hospital and, commencing with that year and through 1944, he has been exempt from the payment of taxes on real property to the value of \$500.00. The land was sold to the state in 1933 for the unpaid 1932 taxes and later the certificate was certified to the Trustees of the Internal Improvement Fund as being one affected by the Murphy Act.

Under Chapter 17400, Acts of 1935, which amends Chapter 16252, Acts of 1933, commonly called the Futch Act, if taxes assessed for the years 1934, 1935, 1936, 1937 and 1938 were paid in full prior to July 1, 1939, all tax certificates and liens for delinquent taxes against real property for the year 1933 and previous years would be held by the state beginning with July 1, 1939 for 15 years. The property herein being exempt from taxation, no taxes were assessed for the five year period, 1934 through 1938, and thus there were no taxes payable nor any to offer to pay. This had the effect, it is my belief of causing the 1933 tax certificate to be frozen, in accordance with the above Act, for fifteen years beginning in 1939 and it was not, accordingly, dealt with under the Murphy Act.

In 1941 the legislature passed Chapter 20981 which cancelled and discharged the lien of all tax certificates held by the state by authority of the Futch Act.

Although the land herein was conveyed as Murphy Act land, the state never received the title to the property; the grantee, who later conveyed his interest, conveyed nothing and the present occupant of the premises holds no title. The former owner, accordingly, may bring an appropriate action to eject anyone now in possession of the premises.

There is not seen any action for the trustees to take other than to advise the former owner, or anyone interested for him, that the lands were erroneously certified to the trustees as land upon which the Murphy Act would operate.

February 28, 1945.—045-61.

CHURCH OWNERSHIP—PROVISIONS OF FUTCH ACT

QUESTION: Would the tax exemption to a church suspend, pursuant to the Futch Act, a 1909 tax certificate issued prior to the church ownership?

To Honorable F. C. Elliot, Secretary, Trustees of the Internal Improvement Fund:

An examination of this subject reveals that a tax certificate was issued in 1909 and another in 1933, both being certified to the Trustees of the Internal Improvement Fund; that in 1928 the property was conveyed to a church.

The 1933 tax certificate was issued after the title vested in the church and it may be cancelled according to Section 19436, Florida Statutes, 1941, which provides that when the comptroller becomes satisfied that a tax certificate evidencing a sale is void because the lands are not subject to taxation at the time of the assessment, he may authorize the clerk of the circuit court to cancel the same.

As to the certificate issued in 1909, it is my opinion that this was acted upon by the Futch Act, Chapter 16252, Acts of 1933. Therein, if the taxes assessed for the years 1932, 1933, 1934, 1935 and 1936 were paid in full prior to July 1, 1937, all tax certificates and delinquent tax liens against real property for the year 1931 and previous years would be held by the state beginning with July 1, 1937, for fifteen years. The church property herein was exempt from taxation commencing in 1929 and no taxes legally were assessable for 1932 to 1936; hence, there were no taxes due or payable and it is my conclusion that this caused the 1909 certificate to remain suspended in accordance with the Futch Act for fifteen years beginning in 1937. Being in abeyance it was not possible for the certificate to be affected by Chapter 18296, Acts of 1937.

The legislature in 1941, passed Chapter 20981, which authorized the comptroller and the clerks of the circuit courts to cancel and satisfy of record all tax certificates held in suspension under the Futch Act, and this included the 1909 certificate.

February 5, 1945.—045-23.

COUNTY LANDS—METHOD OF SALE; NOTICE

QUESTION: Where notice is given that a sale of county lands will be held between 11 o'clock a. m. and 2 p. m., may bids be accepted until 2 o'clock?

To Honorable W. G. Jones, Acting Clerk of the Circuit Court, Cross City, Florida:

You are advised that you may receive bids up to and later than 2 o'clock, if the sale has not been completed, or, if in the exercise of your sound judgment, you believe the same to be advantageous to the county in the sale of the property. When you have become satisfied that no additional benefit will result to the county by further delaying completion of the sale, it is your duty to bring the sale to an end and dispose of the property to the highest bidder for cash.

From an inspection of the language of the statute which authorizes the notice you have given, it is observed that the sale may be held "at any time specified in the notice between the hours of 11 a. m. and 2 p. m. of said day of sale." It is my opinion that this indicates that your notice should name a definite hour between 11 a. m. and 2 p. m. at which you will commence entertaining bids.

If for any reason you desire to adjourn a sale, proper announcement should be made as to when the sale will be resumed.

January 31, 1941.—045-22.

RIGHT OF REDEMPTION—TIME

QUESTIONS: 1. Where a bill of complaint has been filed to quiet and confirm title to lands in a county, until what time does the right of redemption exist?

2. Is an order of court necessary for redemption, after the bill is filed?

3. Must there be paid by persons redeeming, any part of the expense of the suit?

To Honorable Ben Coker, Clerk of the Circuit Court, Hardee County, Wauchula, Florida:

I presume your inquiry has reference to Section 36, Chapter 20722, Acts of 1941, as amended by Chapter 22079, Acts of 1943, Section 194.47, Florida Statutes, 1941, a study of the same indicating that it pertains to the manner in which lands, against which there are tax certificates two years old, vest in a county after the filing of a bill of complaint by the county, notice to former owners of the property to show cause by a day certain why the fee simple title should not be decreed to be vested in said county, and subsequent entry of a final decree.

An additional provision of Section 36, as amended, states that on or before the return day of said notice, supra, any person, firm, or corporation shall have the privilege of purchasing from the clerk all tax liens, tax sale certificates and subsequent and omitted county taxes upon said lands, for the amount due at such time of purchase, including all interest, penalties and charges allowed by law. Parenthetically, it is observed that any person so purchasing taxes and tax liens shall likewise be required to purchase or pay any municipal tax liens thereon outstanding and unpaid at such time.

In the case of Leon County vs. Crawford, 15 So. 2d. 321, 323, the court held that although the statute is not clear on the point, the right of redemption on the part of the original owner of lands as to all tax sale certificates exists until the final decree in the chancery proceeding is entered. It appears, therefore, that you may accept redemption up to the entry of the final decree.

In answer to the second question, it was not found that an order of the court is required to redeem after a suit has been filed, nor, referring to the third question above, was it ascertained that anyone redeeming must pay any part of the expenses of the suit in addition to the amount remitted in redemption.

July 5, 1945.—045-172.

REDEMPTION OF LAND

QUESTION: At the conclusion of a tax sale an individual representing the owners of the land tendered the clerk of the circuit court the amount required for the redemption of the tax deed application, notwithstanding the fact that at the tax sale the property had been sold to another individual at a higher bid than was required for the redemption of the property.

Does the individual representing the owners have the right to redeem the property after the sale but prior to the actual issuance of the deed?

To Honorable Jess Mathas, Clerk of the Circuit Court, Volusia County, DeLand, Florida:

Section 194.02, Florida Statutes, 1941, says:

"An owner . . . may redeem land which is offered for sale for the nonpayment of taxes any time after such sale and before a tax deed is issued thereon."

In my opinion the owner of the property can redeem same until the deed has actually been issued by you.

"It is too well settled to now be questioned that the owners may redeem from tax sale certificates and subsequent taxes paid at any time before issuance of valid tax deed." Banks v. Shaw, 198 So. 341, and cases therein cited.

November 26, 1946.—046-498.

DISTRIBUTION OF FUNDS—TAX SALE PROCEEDS

QUESTION: Under Chapter 22079, Acts of 1941 as amended, Suwannee county, Florida, acquired title to the E½ of the SE¼ of Section 36, Township 5 South, Range 14 East. Upon application this property was advertised and sold to the highest bidder for the net sum of \$396.25. In computing the taxes accrued against this property, as provided for in this chapter, I find that the property was homestead exempt with only two years of bond tax due, that is school bond tax. The property is located in School District No. 4 and the total tax was \$15.47. Should I distribute the entire \$396.25 to School District No. 4 Bond or should any portion of the net proceeds be divided between the county and school general fund?

To Honorable J. L. McMullen, Clerk of Circuit Court, Suwannee County, Live Oak, Florida:

I assume that this property is outside of any municipality.

I assume further that the tax mentioned of \$15.47 was the only tax lien against the said property and that there are no outstanding individually owned county tax sale certificates.

Section 194.55(5) says that after the clerk of the circuit court shall calculate the amount of taxes due on the property at the time the title was acquired by the county, he shall pay certain costs and "shall distribute the county's share in proportion to the interests of the several taxing units of the county and the funds of such units, according to millage rates in existence and use for the year in which such proceeds of sale are received and distributed . . . After the distribution should there remain any excess, the same shall be applied in payment of special improvement liens of . . . county . . . and any remainder shall be distributed to the county . . . in the same proportion as that governing distribution on liens for general taxes."

In light of the above law, it is my opinion that after the said costs and the amount due School District No. 4 are paid in full, any special assessment shall then be paid and the balance, if any, shall be distributed to the county in the same proportion as that governing the distribution on liens for general taxes—which are those taxes declared by Section 192.21, Florida Statutes, 1941, as levied for the general operation of the county as assessed under Section 193.32, Florida Statutes, 1941.

TANGIBLE AND INTANGIBLE PERSONAL PROPERTY TAXATION —

August 20, 1946.—046-353.

REFUND OF TAXES—LIMITATION

QUESTION: Does the limitation, contained in Section 215.26, 1945 Cumulative Supplement to Volume I, Florida Statutes, 1941, requiring that "application for refunds as provided in this section shall be filed with the comptroller within one year after the right to such refund shall have accrued, else the right shall be barred," also apply and limit the making of refunds of intangible personal property taxes under Section 199.31, 1945 Cumulative Supplement to Volume I, Florida Statutes, 1941?

To Honorable J. M. Lee, State Comptroller:

Section 199.31, Florida Statutes, 1941, as amended by Chapter 22008, Laws of Florida, Acts of 1945, and Section 215.26 of the Cumulative Supplement to Volume I, Florida Statutes, 1941 (a 1943 act) each appear to provide for refunds of intangible personal property taxes, unless one of such sections has been repealed, amended or changed by the other section. Section 199.31 first appeared as Section 33 of Chapter 20724, Acts of 1941, and was amended by Section 3, Chapter 21943, Acts of 1943, and by Sec-

tion 10, Chapter 22867, Acts of 1945. This section of the law contains no limitation upon the period of time within which applications for refund may be filed. Section 215.26 was first enacted as Section 1 of Chapter 22008, Acts of 1943, which became a law on June 10, 1943. Chapter 21943 became a law on June 5, 1943, five days prior to the effective date of Chapter 22008; however, said Chapter 21943 was amended in 1945.

The question for consideration is the effect of Section 215.26 upon Section 199.31, as amended in 1943 and again in 1945. There is only one substantial difference between these two sections, in so far as they provide for refunds of taxes. Section 215.26 contains a limitation within which applications for refund may be filed while Section 199.31 contains no such provision.

Statutes relating to taxation must be given a construction favorable to the taxpayer, and repeals by implication are not favorable. A prior statute is not repealed by a subsequent one unless the two statutes are manifestly inconsistent and repugnant (*American Bakeries Company v. Haines City*, 131 Fla. 790, 180 So. 524). The mere fact that a later statute relates to matters covered by a prior one does not cause a repeal of the prior one unless there be a positive inconsistency and repugnancy between them. To effect a repeal by implication there must be an actual irreconcilable conflict between the two statutes (*State v. Gadsden County*, 63 Fla. 620, 58 So. 232). Before an implied repeal of a statute, because of repugnancy or inconsistency, is effective, it must be impossible to execute both laws (*Reo Atlanta Company v. Stern*, 279 Fed. 422; *State Board of Election Commissioners v. Coleman*, 235 Ky. 24, 29 S. W. 2d. 619). The repugnancy and inconsistency must be such that the two statutes may not be harmonized, and both cannot stand and have force, application, operation and effect (59 C. J. 916, Section 516).

The following matters and things indicate that Section 199.31 was not repealed by the adoption of Section 215.26:

1. The legislature of 1945, by re-enacting the refund provision of Section 199.31 and by adding thereto additional provisions, appears to have placed a legislative construction thereon as surviving the adoption of Section 215.26 in 1943.

2. Although Section 199.31 seems to cover a portion of the same subject covered by Section 215.26, they are not so inconsistent or repugnant as not to stand together.

3. Section 199.31 may stand as an additional method of securing refunds to Section 215.26 and both laws may be executed within their proper field, although there may be an overlapping.

4. There does not seem to be any conflict, antagonism, inconsistency or repugnancy between Sections 199.31 and 215.26, and Section 199.31 appears to be merely cumulative or auxiliary to Section 215.26.

5. There appears no reason why the two statutes may not be harmonized and why both cannot stand and have force, application, operation and effect.

Having determined that Sections 199.31 and 215.26 may stand together, we must determine the effect of the following provision contained in Section 215.26, upon Section 199.31, to wit:

"Application for refunds as provided by this section shall be filed with the comptroller within one year after the right to such refund shall have accrued else such right shall be barred."

The very language of the above provision seems to limit it to "refunds as provided by this section," that is, Section 215.26. The provision does not seem to apply to refunds generally from the state treasury but only to such refunds as may be permitted under Section 215.26. It, therefore,

seems that the limitation may only be applied to refunds where application is made under Section 215.26 and not to refunds under Section 199.31 and similar statutes.

I am, therefore, of the opinion that the above question must be answered in the negative.

September 23, 1946.—046-396.

PROPERTY OF AIR LINES—BASIS OF TAXATION

QUESTION: May the tax assessors of two or more counties, through which a commercial air line operates and has depots where its aircraft make regular stops for the purpose of discharging and taking on passengers, by mutual agreement make an over-all valuation of the aircraft used by such air line in the operation of its said business and allocate a certain percentage of such over-all valuation to each such county to be assessed for taxes in such county?

To Honorable J. M. Lee, State Comptroller:

By way of illustration, let us take the Eastern Air Lines, operating in this state and making regular stops in about nine counties. May the several tax assessors of the said nine counties meet and agree on a valuation of the portion of the aircraft of said air line used in the operation of its business in this state and then allocate such valuation among the said nine counties on a percentage or other basis, to be placed upon the tax rolls of said counties, without regard to the residence of the owner of such aircraft or to their home port or actual situs? In other words, may the said nine tax assessors constitute themselves into a board similar to the railroad assessment board under Section 195.01, Florida Statutes, 1941, without legislative authority and make a similar assessment and allocation of air lines as the said railroad assessment board does of railroads?

Aircraft are undoubtedly personal property within the definition of tangible personal property contained in Sections 193.03 and 200.01, Florida Statutes, 1941. I find no provision in the taxing statutes of this state for such an assessment as above mentioned (see Sections 192.01, 193.11, 200.02, 200.09 and 200.13, Florida Statutes, 1941). The general rule is that the situs of personal property for the purpose of taxation is primarily at the domicile of the owner, subject to certain exceptions such as the acquisition of a fixed situs different from that of the owner (*Atlantic Coast Line Railroad Company v. Amos*, 94 Fla. 588, 115 So. 315, text 320). It is essential to the power of taxation that either the owner of the personal property be a resident or the property be situated within the district attempting to exercise the power to tax (*Atlantic Coast Line Railroad Company v. Amos*, supra). Before tangible personal property may be taxed in a state other than the domicile of the owner, it must have acquired a more or less permanent location in that state and not merely a transient or temporary one (6 Am. Jur. 9, Section 11; 51 Am. Jur. 468, Section 453).

The taxing power of the state is exclusively a legislative function and taxes can be imposed only in pursuance of legislative authority, there being no such thing as taxation by implication (61 C.J. 81, Section 10; 51 Am. Jur. 74, Section 44). Since taxation is exclusively a legislative function, the foundation for all lawful state taxation must be laid by a valid act of the legislature (61 C.J. 167, Section 118; 51 Am. Jur. 74, Section 44). Under our constitution "no tax shall be levied except in pursuance of law" (Section 3, Article IX, State Constitution). Taxation being a legislative power can be exercised only pursuant to a valid statute containing definite limitations (*Stewart v. Daytona and New Smyrna Inlet District*, 94 Fla. 859, 114 So. 545, text 547; *Kathleen Citrus Land Company v. City of Lakeland*, 124 Fla. 659, 169 So. 356, text 358). In the last men-

tioned case, the supreme court said "it is difficult to conceive of a more reprehensible dereliction of official duty than . . . the exercise of arbitral power in the matter of taxation contrary to constitutional or statutory inhibitions. Such conduct is a renunciation of official obligation, the usurpation of authority" (*Kathleen Citrus Land Company v. City of Lakeland*, supra).

There being no statute providing for the taxation of aircraft used by commercial air lines in this state in a similar manner as the taxation of rolling stock of railroads by the railroad assessment board under Chapter 195, Florida Statutes, 1941, we must hold that an attempted assessment of such aircraft, as stated in the above question, is illegal. The question must, therefore, be answered in the negative. Although it seems clear that air lines may escape taxation that might be legally levied against them under proper legislative authority, such escape from taxation can only be remedied by the legislature and not by the taxing authorities of the several counties of the state.

June 29, 1946.—046-289.

FAIR MARKET VALUE—ASSESSMENT

QUESTION: What should the assessed value be for intangible tax purposes for securities involved in a trust fund where there is a wide difference between the bid price on January 1 and the asked price. Which of the two figures should be used for assessment purposes?

To Honorable W. Homer Smith, Tax Assessor, Volusia County, DeLand, Florida:

I do not think that any one of the two figures alone can be used for assessment purposes.

In connection with the perplexing question of assessing intangibles, I would refer you to the excellent opinion of Judge Terrell in the case of *Root vs. Wood*, 21 So. 2d. 133. In that case the court discusses the difficulties in assessing intangibles, the factors which will enter into such assessments and certain formulas which have been adopted in making such assessments.

In that opinion, among other things, the court says:

"Both acts (1931 and 1941 Acts) employ the terms 'true taxable value,' 'true and just value,' 'valuation for tax purposes,' and perhaps others but they all bear reference to and are synonymous with 'fair market value.' A fair market value has been defined as that which a purchaser willing but not obliged to buy would pay to one willing but not obliged to sell."

Adopting the reasoning of the opinion in this case, it cannot be said that the "bid" price is the fair market value nor can the "asked" price be said to be the fair market value. More than likely the fair market value will be somewhere between the two figures.

April 5, 1946.—046-151.

PENSION FUNDS—LIABLE FOR TAXATION

QUESTION: Are the intangible assets of employees' pension and profit-sharing plans, in this state, subject to assessment for intangible personal property taxes under the Florida statutes?

To Honorable J. M. Lee, State Comptroller:

Section 199.02, subsection (5), Florida Statutes, 1941, as amended, provides that:

Intangible personal property belonging to the State of Florida, or any political subdivision thereof, and intangible personal property belonging to any religious, charitable, benevolent or educational association shall be exempted from taxation.

The property in question belonging to neither the state nor any of its political subdivisions, it is not exempt unless the property of some religious, charitable, benevolent or educational association.

It seems that the organization in question is neither a religious nor an educational one. From the authorities, it appears that the said organization is likewise neither a charitable nor benevolent association or organization. (See 40 Am. Jur. 978, Section 21; 5 Words and Phrases 348-361; 34 Words and Phrase 244 et seq.; *Lyon v. Commission of Corporations and Taxation*, 155 N. E. 440.) Laws providing for exemption from taxation should be strictly construed. (61 C. J. 292, Section 396.)

The property in question would appear to be held by the association in the nature of a trust. Personal property in the hands of a trustee is assessable to the trustee rather than the beneficiaries. (51 Am. Jur. 646, Section 692; 61 C. J. 212, Section 190.)

The above question should be answered in the affirmative, and the property should be assessed in the name of the trustee, association or organization holding title to such property for the benefit of the employees in question.

April 12, 1946.—046-153.

OIL AND GAS LEASES—PERSONAL PROPERTY

QUESTION: Are oil and gas leases encumbering lands in this state subject to taxation as intangible personal property under Chapter 199, Florida Statutes, 1941?

To Honorable J. M. Lee, State Comptroller:

Intangible personal property is defined by Section 199.01, Florida Statutes, 1941, as "personal property which is not in itself intrinsically valuable but which derives its chief value from that which it represents." In order to answer the above question we must ascertain the nature of oil and gas leases and their nature as property in this state.

The situations from which courts have been called upon to determine the nature of legal interests created by oil and gas leases and other agreements are many and diverse, involving many classifications of legal interests and operative agreements. From this variety of situations, the peculiarity of the subject matter and the varying types of lease agreements, it is only natural to expect a lack of uniformity of court decisions on this question. This is further demonstrated by the decisions in which the interest created by oil and gas leases have been held to be corporeal hereditaments, incorporeal hereditaments, estates in land, not estates in land, chattels real, personal property, servitudes, tenancies, licenses, etc. This diversity of the court decisions is largely due to the particular instrument which the court may have had under consideration and upon which its decision was based; and by reason of the fugitive nature or vagrant habits of oil and gas while in the earth.

Strictly speaking, the usual oil and gas so-called lease is not a lease at all but is merely a license to explore for oil and gas and to take the same in case discovered. It is a mere incorporeal right to be exercised in the lands of another and is not usually real property. (40 C. J. S. 1047, Section 661). Where oil or gas is severed from the realty and reduced to possession it becomes personal property. (40 C. J. S. 904, Section 442.) The majority of the decisions of the courts of this country hold the ordinary oil and gas lease to be a mere incorporeal right, an incorporeal here-

ditament. (40 C. J. S. 1047, Section 661; 1 Summers Oil and Gas 371-505.) Incorporeal hereditaments are usually considered as personal property. (42 Am. Jur. 199 and 206, Sections 19 and 25.) They are invisible and intangible rights. (50 C. J. 757, Section 31.)

Where an oil lease agreement has the effect of severing oil from the realty, the oil would be tangible personal property (few leases are of this nature); but where it merely grants to the lessee a mere license to go on the premises and drill and operate wells and take oil from the wells when located they do not sever the oil until taken from the well, the rights granted are usually held to be incorporeal hereditaments. (10 Thompson on Real Property 699, Section 5602.) Most leases in this state seem to be of the latter class.

Interests in oil and gas, which may be granted by oil and gas leases, in this state should not be taxed until severed from the ground; this because "it is impossible under known valuation methods to accurately ascertain the true value of oil and gas in place" (Section 13, Chapter 22784, Acts 1945). The severance tax provided by Chapter 22784 seems to be in lieu of all other taxes on oil in place.

Under the statutes of this state "intangible personal property shall be assessed in the county where the taxpayer resides or has his usual abode. (Section 199.08, Florida Statutes, 1941.) As a general rule, incorporeal hereditaments are taxable only at the place where the land lies to which they pertain or out of which they grow. (61 C. J. 518, note 43; 2 Cooley on Taxation, 4th Ed. 950, Section 448.) Chattels real are not to be grouped with intangibles evidencing indebtedness, which are chattels personal. (Greene Line Terminal Company v. Martin, 122 W. Va. 483, 10 S. E. 2d. 901, text 906.) Incorporeal hereditaments are intangible personal property which possesses characteristics peculiar unto themselves; they constitute an interest in land, while other intangibles do not; they are immobile, while other intangibles are mobile; they constitute chattels real, while other intangibles are chattels personal. (Greene Line Terminal Company v. Martin, supra; 42 Am. Jur. 206, Section 25.)

"Under Florida taxing statutes the levy and assessment is on the realty itself, at its full cash value, regardless of the existence of estates in it. Wolfson et al. v. Hiers et ux., 149 Fla. 499, 6 So. 2d. 858." (Bancroft Investment Corporation v. City of Jacksonville, not yet reported.) This seems to require that all interests in real estate be included in one assessment and not in separate assessments.

In the light of the above and foregoing authorities, and the fact that interests of the lessee in oil and gas leases cannot be accurately valued, I am of the opinion that the above stated question should be answered in the negative.

October 9, 1945.—045-316.

ANNUITY CONTRACTS—INTANGIBLE TAXES

QUESTIONS: 1. In the light of the opinion of the Florida Supreme Court, in the case of Owen v. Fosdick, 153 Fla. 17, 13 So. 2d. 700, are annuity contracts providing for periodical payments during the life of the annuitant subject to taxation as intangible personal property in this state?

2. Are annuity contracts providing for periodical payments for a given number of years, with authority in the annuitant to nominate who shall receive any unpaid portion of the annuity at the time of his death, or right to change the annuitant, subject to taxation as intangible personal property in this state?

To Honorable J. M. Lee, State Comptroller:

Your request for an opinion relates to "annuity contracts" and periodical payments made pursuant to such contracts. Therefore, I am limiting this opinion to such contracts and payments, and am excluding periodical payments from trust funds and from funds bequeathed or donated to trustees.

For the purposes of this opinion "annuity contracts" are obligations to pay an annuitant a certain sum of money at stated times during his life, or for a specified time, in consideration of a sum paid for such obligation. (3 C. J. S. 1374, Section 1). The above sum paid need not be a cash consideration but may be anything of value.

In order to understand the difference between taxable annuity payments and nontaxable periodical income or other payments, reference is made to two opinions of the Florida Supreme Court, one of which was mentioned in your request for an opinion, dealing with periodical payments from funds bequeathed or donated to a trustee. In one of these opinions the periodical payments in question were held to be subject to taxation as intangible personal property in this state, while in the other they were held to be income and not subject to taxation. These two opinions seem to draw the distinction between periodical payments constituting income and those that do not constitute income. In *Wood v. Ford*, 148 Fla. 66, 3 So. 2d. 490, the instrument creating the trust from which periodical payments were to be made, provided for the payment of a sufficient sum for a particular purpose whether the income from the trust was sufficient for that purpose or not. It provided that if the income was insufficient, a part of the principal of the trust might be used to supplement the income. These payments were held subject to taxation as an intangible in this state. In *Owens v. Fosdick*, 153 Fla. 17, 13 So. 2d. 700, mentioned by you in your request for an opinion, the periodical payments were to be made from income only, subject to forfeiture or suspension in case of bankruptcy, and no part of the principal was to be used in making such payments. These payments, being made from income only, were held income of the annuitant and not subject to taxation in this state, because of Section 11, Article IX, Florida Constitution. The distinction between the above cases was not whether one was an intangible and the other something else, but whether the periodical payments constituted income or not.

"Income" has been distinguished from "annuity" in that "income" means profits earned, the amount thereof not being fixed or certain, but contingent on the amount of earnings, while "annuity" means a fixed amount directed to be paid absolutely and without contingency. (3 C. J. S. 1374, Section 1). Installment payments of a debt or sum due, and interest payments, do not constitute an annuity. (*Commonwealth v. Beisel*, Pa., 13 A. 2d. 419, text 421, 128 A. L. R. 978).

"Annuity" is a term loosely used in financial and legal nomenclature, which is perhaps incapable of exact definition. Generally speaking, it is used to designate a right (either bequeathed, donated or purchased), to receive fixed periodical payments, either for life or for a given number of years (13 C. J. S. 1374, section 1). "One of its determining characteristics is that the annuitant has an interest only in the payments themselves and not in any principal fund or source from which the payments may be derived. The purchaser of an annuity surrenders all right and title in and to the money he pays for it." (*Commonwealth v. Beisel*, Pa., 13 A. 2d. 419, 128 A. L. R. 978).

Annuities and annuity contracts have been held intangible personal property subject to taxation in several of the states (*Board of Commissioners v. Sand Springs Home*, Okla., 92 P. 2d. 376; *Wilkin v. Board of Commissioners*, 77 Okla. 88, 186 P. 474; *Bowman v. Tax Commission*, 135 Ohio St. 295, 20 N. E. 2d. 916; *Sanborn v. MacCanless*, Tenn., 178 S. W.

2d. 765; 61 C. J. 203, Section 178; 2 Cooley on Taxation, 4th Ed. 1234, Section 571). By an opinion of this office, under date of September 14, 1942 (1941-1942 Biennial Report 204), it was held that annuity contracts are subject to taxation under the intangible tax laws of this state, under class "D". This opinion I now confirm. (See also 1933-1934 Biennial Report 59).

The taxing officials, when dealing with periodical payments, should use care to determine whether such payments constitute a taxable annuity or nontaxable income, or the installment payment of an indebtedness such as a promissory note, bond or similar instrument payable in installments which may or may not be taxable depending upon its nature. When dealing with contracts between employers and employees, providing for disability or old age relief payable in installments, care should be taken to ascertain the exact nature of the contracts. Some of these contracts may constitute annuity contracts while others may constitute contracts for beneficial relief or insurance. Where they may constitute annuity contracts such contracts would not seem to be consummate until the employee had complied with all the requirements to entitle him to the annuity, such as making a certain number of donations, working for a certain number of years, and meeting such other conditions as may be imposed. They would seem to be inchoate until the conditions were complied with.

I am, therefore, of the opinion that each of the above questions should be answered in the affirmative, under the qualifications hereinabove set forth.

March 30, 1945.—045-83.

PUBLICATION OF NOTICE

QUESTION: May the notice mentioned in Sections 199.18 and 200.27, Florida Statutes, 1941, be published on a day other than the fifteenth of April when said day is a Sunday, or when no newspaper is published in the county on the fifteenth of April?

To Honorable Charles W. Luther, County Attorney, Daytona Beach, Florida:

Sections 199.18 and 200.27, Florida Statutes, 1941, which relate to taxation of tangible and intangible personal property in this state, provide, either in substance or actually, that "on April fifteenth . . . the tax collector shall advertise . . . in some newspaper . . . to be selected by the board of county commissioners . . . a notice setting forth the names of delinquent . . . taxpayers and the amount of taxes due by each." The taxes in question are delinquent from and after May the first of the year following the year of assessment and if not paid by that date become subject to a penalty and interest until paid. After delinquency the statutes provide for the issuance of a tax execution, which is given the force and effect of a common law judgment and execution issued thereon, under which the personal property assessed or other personal property may be seized and sold in the same manner as under an execution upon a judgment in the circuit court. After seizure and levy of the execution the same advertisement and other proceedings are had as in sheriff's sales under execution. The notice required to be given on April the fifteenth seems to be intended to notify the taxpayer of the delinquency and the amount thereof. It does not seem to be any part of the actual process under which seizure and sale is made.

Section 192.21, Florida Statutes, 1941, provides that "no act of omission or commission on the part of any . . . tax collector or county commissioners . . . shall operate to defeat the payment of . . . taxes . . . All owners of property shall be held to know that taxes are due and pay-

able thereon annually, and are hereby charged with the duty of ascertaining the amount of such tax and paying the same . . . all provisions of law . . . relating to the assessment and collection of revenue . . . shall be deemed and held to be directory only . . . and no sale . . . of personal property for non-payment of taxes . . . shall be held invalid except upon proof that the property was not subject to taxation . . . etc." This section seems to indicate that the provision for publication of notice in question on the fifteenth of April is directory and not mandatory.

In construing a statute the purpose of the statute should be considered (*State v. Bowden*, 112 Fla. 288, 150 So. 259) and it should not be construed so as to lead to absurd consequences not designed by the legislature (*Getzen v. Sumter County*, 89 Fla. 45, 103 So. 104) or to defeat its intended purpose (*State v. Rose*, 97 Fla. 710, 122 So. 225). Resort may also be had to contemporary conditions (*Liggett Co. v. Amos*, 104 Fla. 609, 141 So. 153). When the statute in question was enacted the legislature well knew that of the sixty-seven counties of the state only a small per cent of them had daily newspapers and most of them had weekly newspapers printed on some definite day of the week and that the chances of such weekly paper being printed on the fifteenth of April was not more than one year out of each five or six.

I am, therefore, of the opinion that the statutes in question should be construed as requiring the publication of the notice in question on some weekday, on or following the fifteenth of April, but as near to said day as in reasonably possible under the circumstances when no newspaper in the county is published on that day. To construe the statute otherwise would make compliance with it impossible in many counties.

April 16, 1945.—045-106.

OATH—ELIMINATION FROM RETURNS

QUESTION: Does Section 1, Chapter 22097, Acts of 1943, eliminate the oath from returns of intangible personal property, returns of commercially used tangible personal property, and applications for homestead exemption?

To Honorable A. G. Jordan, Tax Assessor, Charlotte County, Punta Gorda, Florida:

The matter appears to be covered by Chapter 21950, Laws of Florida, Acts of 1943 (Section 192.57, 1943 Cumulative Supplement to Florida Statutes, 1941), which act provides in part that:

"No tax return or application for tax exemption, license or permit of any kind or nature that may be required by law need be made under oath."

This act became a law on June 8, 1943.

March 22, 1945.—045-75.

INTOXICATING LIQUORS TEMPORARILY STORED

QUESTION: Are intoxicating liquors warehoused in Miami for temporary storage subject to assessment for ad valorem tangible personal property tax?

To Honorable J. M. Lee, State Comptroller:

I have perused the person's opinion enclosed in your letter and beg leave to state that I am in accord with his conclusion that the intoxicants upon arrival into the state and delivery to the consignee become subject to the tax laws and subject to assessment thereunder.

April 13, 1945.—045-91.

MORTGAGE SECURED BY REAL ESTATE OUTSIDE OF FLORIDA

QUESTION: Has the amendment to Section 1, Article IX of the constitution, which was adopted at the general election in 1944, changed or amended the classifying of mortgages on real estate located outside the State of Florida as class "D" intangible assets as decided by our supreme court in the Genessee case from Palm Beach county?

To Honorable J. M. Lee, State Comptroller:

I beg leave to state in reference to the foregoing that I have examined the amendment in question and it does not appear to affect the decision in the Genessee case which, by the way, was rendered subsequent to the adoption of the amendment.

June 26, 1945.—045-155.

CLAIM FOR REDUCTION IN VALUE BECAUSE OF ALLEGED "BLOCKAGE"

QUESTION: Is certain intangible property of the "A" testamentary trust, of which the "X" National Bank is trustees, or any part thereof, entitled to exemption from intangible taxation because of its charitable quality, and because the value of certain securities comprehends so large a block that they could not be sold upon the New York Stock Exchange without breaking the market, and that the value thereof should be decreased because of the anticipated blockage?

To Honorable J. M. Lee, State Comptroller:

At the outset as to both of these inquiries it should be borne in mind that the intangible tax is not upon income but upon securities held by the bank as trustee, and that what may happen to the income after it leaves the trustee is hardly germane in considering either of the foregoing questions.

In a statement presented by the trust's counsel to the Board of County Commissioners of Duval county, Florida, on Friday, October 27, 1944, it appears that under "A's" will and codicils, the trustees were required to pay annually annuities to various annuitants and during the life of "A's" wife to pay to her the remainder of the income derived from the residuary estate, and after her death to pay such net income to the "N" Foundation, a charitable corporation.

In this statement it is adroitly suggested that the effect of this was to vest in "A's" wife a residuary equitable life estate in the assets held by the trustee and to vest in the "N" Foundation the equitable ownership of such assets, subject only to the right of "A's" wife and the other annuitants.

From this statement of counsel it would appear that during her life "A's" wife has the right to the income, and apparently without any restraint upon her disposition of it, and the interest of the charitable "N" Foundation does not come into being or become effective until her death. If this be so, then there is not at the present time or until the death of "A's" wife any element that could satisfy the constitutional exemption because of the charitable nature of the property.

It is therefore my opinion that the exemption claimed should be disallowed.

Approaching the second part of the inquiry I beg leave to state as to the blockage theory that, as was said in *Phipps vs. Collector of Internal Revenue*, 127 Fed. 2d. 214,—"the ultimate place of the blockage theory in the field of valuation has not yet been finally determined."

In the same decision upon the basis of cited authority it was further said that "the most that the courts have said is that it is a factor to be considered along with all others in determining value . . ."

There might be some practical utility in considering this element where an intent to dispose of such a block of securities was present, such as a disposition made necessary in the administration of an estate, but where no intention to dispose of the stock has been shown, to make a deduction on account of alleged blockage would seem to be a deduction before the happening of the condition upon the basis of which it is claimed that the value should be decreased. Such an anticipation as appears in the instant case should not be indulged in any more than the tax assessor should be requested to increase the value because of possible strategic value the securities might possess in the control of a corporation issuing the securities or in purchasing power in the event of liquidation.

It is my opinion that the claimed deduction on account of an anticipated "blockage" should also be disallowed.

December 14, 1946.—046-509.

PROPERTY HELD FOR SAFEKEEPING—RETURN

QUESTION: Where a banking institution or trust company, doing business in this state, receives custody of bonds and interest coupons from the owner thereof, for safekeeping and to act as agent of the owner in collecting interest and other payments thereon in behalf of said owner, is such banking institution or trust company required, under Section 199.07, Florida Statutes, 1941, to make return of such bonds and interest coupons to the county tax assessor for purposes of taxation?

To Honorable C. M. Gay, State Comptroller:

Section 199.07, Florida Statutes, 1941, as amended, makes it the duty of "every person, firm or corporation in this state owning or having the control, management or custody of intangible personal property which is subject to taxation under the laws of Florida, including trustees, executors, administrators, receivers and other fiduciaries," to make tax returns of such property to the proper tax assessor in this state. A substantially identical provision is contained in Section 200.08, relating to tangible personal property. Section 193.12, which formerly related to tax returns of all property subject to ad valorem taxes, makes it the duty of "every person owning or having the control, management, custody, direction, supervision or agency of property . . . subject to taxation" to return the same for taxation. When the above Section 199.07 is read in connection with other sections of the statute (Sections 199.01, 199.04, 199.08, 199.09, 199.10, 199.18 and 199.22), we find no further reference to any person having the control, management or direction of tangible personal property other than the taxpayer which is defined to be the person liable for the payment of the taxes (Section 199.01).

General and specific words in a statute which are associated together, and which are capable of an analogous meaning, take color from each other, so that the general words are restricted to a sense analogous to the less general. Under this rule, general terms in a statute may be regarded as limited by subsequent more specific terms. (50 Am. Jur. 244, Section 249; 59 C. J. 980, Section 580; 2 Sutherland Statutory Construction, 3rd. Ed. 401, Section 4911).

See *In Re. Stryker*, 158 N. Y. 526, 53 N. E. 525, 70 Am. St. Rep. 489, holding that, in determining what claims shall be preferred, under a statute which gives a preference to "the wages of the employees, opera-

tives and laborers" of corporation in the hands of receivers, the general and comprehensive word "employees" must be limited by the more specific words "operatives and laborers."

To the same effect, see also *Nance v. Southern Railway Company*, 149 N. C. 366, 63 S. E. 116, text 118; *State v. Board of Commissioners*, 175 Ind. 400, 94 So. 716, text 717; *Myers v. Ada County*, (Idaho), 293 P. 322 text 323.

When we apply the above mentioned rule of construction, as well as the doctrine of *eiusdem generis*, to said Section 199.07, I am of the opinion that the legislature did not intend to require every person having possession of intangible personal property to return the same for taxation but intended that such requirement relate only to persons having a fiduciary relation or that of an agent in control or management of the property. The relationship should be something more than that of a mere possession or bailment.

Therefore, I am of the opinion that the above question should be answered in the negative.

December 31, 1946.—046-526.

INTANGIBLES—LIEN ON PROPERTY

QUESTION: Are intangibles a lien against real property after state taxes have been foreclosed thereon and master's deed issued to a purchaser pursuant to such foreclosure?

To Honorable E. B. Leatherman, Clerk of Circuit Court, Dade County, Miami, Florida:

I assume from your question that the foreclosure proceedings were brought by an individual and certain state tax certificates were foreclosed.

You do not state whether the foreclosure proceedings were based upon former laws of this state, to wit: Chapter 14572, Acts of 1929, extra session, or Chapter 1020, Compiled General Laws of 1927, or the general law pertaining to foreclosure of liens in equity. For the purpose of this opinion, I do not deem this material.

Section 199.22, Florida Statutes, 1941, says:

"All intangible personal property taxes shall be a lien on all the real and personal property of the taxpayer in the county in which they are assessed from the time they become due. All such intangible personal property taxes shall be a lien upon any and all real estate of the taxpayer in every other county from the time that the tax execution is recorded in such other county where the real estate is situated. **The lien of intangible personal property taxes and tax executions shall be superior to all other liens, except liens for other taxes, state, county and municipal, and prior recorded liens on real estate.**" (emphasis supplied)

The language used in this section is susceptible of two interpretations. It can be argued that the lien of the intangible personal property is placed on a parity with the liens for other taxes, state, county and municipal, and prior recorded liens, or it can be argued that the lien of the intangible personal property is rendered inferior to liens for other taxes, state, county and municipal and prior recorded liens on real estate. I am unable to find any decisions of our supreme court which would help us in interpreting the language of this section, but I think the better reasoning would be that such intangible tax liens are inferior to the other liens mentioned therein.

If we should construe said intangible tax liens to be inferior to the other liens mentioned in the act, a question would then arise whether a foreclosure of general state tax certificates wiped out the liens of the intangible taxes inasmuch as I assume the state was not made a party defendant in the suit, and, if it were so made, there is doubt if any such intangible tax liens it might have could be extinguished by the said foreclosure suit.

The case of Tax Securities Corporation vs. Security Investment Corporation, 155 So. 752, lays down the rule:

"The state cannot be made a party defendant in a suit without its consent; and in tax lien foreclosure proceedings, when all taxes due to, and tax liens held by, the state, are not paid before foreclosure sale, such tax liens remain first liens on the property after the sale and until paid or legally satisfied, even though not so stated in the foreclosure decree and conveyance."

If the above state was not made a party defendant, and, if the above case is to be taken as authority for the fact that the state cannot be made a party defendant in such foreclosure suits, the question becomes even more doubtful of a correct interpretation.

In view of the uncertainties and the dearth of authorities on the question propounded, I feel that this office should not make an opinion thereon but should leave same to the interpretation of the courts upon proper procedure being brought to test this question.

December 28, 1946.—046-523.

AUTOMOBILE TIRES—WHEN ASSESSED

QUESTIONS: 1. Where motor vehicle tires are furnished by tire manufacturers to operators of motor vehicles, under a lease or other agreement, for use on such motor vehicles, the compensation for such use being a certain sum per mile of operation of such vehicle when using such tires, are such tires subject to ad valorem taxes in this state as tangible personal property of the manufacturer when in actual use on such vehicles?

2. Where such tires are carried as spares on such motor vehicles, are they subject to such advalorem taxes prior to their actual use on such motor vehicles?

3. Where such tires are stored in this state for use by such operator of motor vehicles, are they subject to such ad valorem taxes prior to their use on such motor vehicles but after storage as aforesaid?

To Honorable C. M. Gay, State Comptroller:

Motor vehicle tires would seem to be tangible personal property under the taxing laws of this state (Section 200.01, Florida Statutes, 1941) and when in this state, on January first of any tax year, are subject to taxation, unless expressly exempted therefrom (Sections 192.01 and 192.04, Florida Statutes, 1941). Under Section 13, Article IX, of the State Constitution, "motor vehicles" as property are subject to a license tax only and not to ad valorem taxes. From the above and foregoing, it seems that such motor vehicle tires are subject to ad valorem taxes in this state, unless a part of a motor vehicle within the purview of the above constitutional provision.

An automobile is a motor vehicle even though not licensed to operate on the public highways (Nolan-Peeler Motors, Inc. v. Wood, 128 Fla. 756, 175 So. 523, text 524). An aerocar, which is a kind of trailer, may become a part of a motor vehicle within the constitutional provision.

(Wood v. Club Transportation Service, Inc., 143 Fla. 449, 196 So. 843, text 843). In the latter case the court said that "aerocars are obviously useless unless they become a part of a motor car"; we might also say that motor cars are obviously useless unless they have tires upon which to travel. Tires are necessary to the operation of motor vehicles, whether they be owned, leased or otherwise acquired. Tires seem to be a necessary part of a motor vehicle. Under our motor vehicle licensing statutes tires appear to be considered as a part of the vehicle to be licensed, the fee for vehicles equipped with solid or airless cushion tires is three times the fee for vehicles equipped with pneumatic tires (Section 320.11, Florida Statutes, 1941). Any person driving a motor vehicle over the highways of this state on its steel rims and without tires, except in emergencies, would probably be violating Section 320.43, Florida Statutes, 1941. If motor vehicles were not exempt from ad valorem taxes doubtless the motor vehicle with leased tires would be subject to taxation without regard to the ownership of the tires; however, motor vehicles are now exempt from ad valorem taxes in this state.

There is no constitutional obligation which requires that property be assessed to the person owning it rather than upon the property itself (51 Am. Jur. 639, Section 681) and usually assessments are a unit upon the sum of the interests or ownerships of the property taxed instead of upon the different estates or interests thereof (51 Am. Jur. 643, Section 681). Tangible personal property taxes are assessed upon the full cash value of such property and not upon the value of the several interests (Sections 200.05, 200.06, 200.08, 200.10 and 200.11, Florida Statutes, 1941). Under Florida taxing statutes the levy and assessment is on the property itself, at its full cash value, regardless of the existence of estates in it. (See Bancroft Investment Corporation v. City of Jacksonville, Fla., 27 So. 2d. Adv. 162, text 167.)

In construing taxing statutes they should be strictly construed in favor of the taxpayer (Lee v. Wood, 126 Fla. 104, 170 So. 433; City of Pensacola v. Lawrence, 126 Fla. 830, 171 So. 793); however, tax exemptions are to be construed against the claimant and in favor of the taxing power in cases of doubt. (Steuart v. State, 119 Fla. 117, 161 So. 378.)

Applying the above principles and rules of construction, I am of the opinion that tires leased by the manufacturer to the owner of a motor vehicle, for use on such vehicle, become a part of that vehicle, within the purview of Section 13, Article IX, of the state constitution, when actually used by such vehicle; however, I do not think that the exemption applies to such tires until actually put into use on such vehicle. I do not think that the spare tire should be considered as being in use on the vehicle.

I am, therefore, of the opinion that the first question should be answered in the negative, the second question in the affirmative, and the third question in the affirmative.

EXCISE TAXES

July 24, 1945.—045-203.

DOCUMENTARY STAMP—TRANSFER—GIFT

QUESTIONS: What amount of documentary stamps would be required under the following circumstances:

1. Where property was owned by a mother, a widow, and her daughter, the mother desiring to deed the daughter all her interest and equity in the property and the daughter desiring to hold and own this property with her husband as an estate by entirety, and mother and daughter executed and delivered a deed to third parties, who in turn deeded the property back to the daughter and her husband as an estate by the entireties?

2. Where "A" deeded to "B" Florida real estate as a gift and "A" subsequently married "B"?

To Honorable J. M. Lee, State Comptroller:

In reply to the first question it is my opinion that if the documentary stamps necessary to pay the tax upon one-half of the value of the property representing the interest conveyed by the mother are affixed, that it will be sufficiently stamped.

In reply to the second question, I beg leave to state that I understand the question to ask if transfers made of a gift are subject to the tax. I find no exemption of gifts from the tax.

In regard to the statement that "A" subsequently married "B," this does not appear to be relevant because no transfer or other document is involved.

October 19, 1945.—045-328.

DOCUMENTARY STAMP—OIL AND GAS LEASES

QUESTION: Are oil and gas leases on real estate in this state subject to the State Excise Tax on documents, under Chapter 201, Florida Statutes, 1941?

To Honorable J. M. Lee, State Comptroller:

Our excise tax on documents appears to have been taken substantially from the federal statutes on the same subject, so that federal court decisions construing the federal statutes are entitled to great weight in construing the state law. (State vs. Cook, 108 Fla. 157, 146 So. 223). The federal courts, in a case from Texas, have held that instruments assigning oil and gas leases are subject to the federal stamp tax. (Morrow v. Schofield, C.C.A. 116 Fed. 2d. 17, certiorari denied, 313 U.S. 573, 61 S. Ct. 961, 85 L. Ed 1531) Our own courts have held that leases of land and of timber rights in this state are conveyances of an interest in lands. This seems to be in line with the holding in the above federal case. Although there is some conflict in the outside authority, it appears that the majority rule is that oil and gas leases convey an interest in the real estate.

In the light of the above mentioned authorities, I am of the opinion that the above question should be answered in the affirmative. In this connection care should be taken to distinguish oil and gas leases from licenses and options, which may or may not constitute an interest in real estate depending upon the terms of the instrument creating them. Licenses and options conveying or granting an interest in the real estate are subject to the tax, while those that do not convey or grant such an interest may not be subject to the tax.

October 25, 1945.—045-341.

DOCUMENTARY STAMP—COUNTY CONVEYANCE

QUESTION: Are deeds of conveyance from the county required to bear documentary stamps?

To Honorable Jess Matha, Clerk of the Circuit Court, Volusia County, DeLand, Florida:

I assume that you have reference to documentary taxes provided in Section 201.02, Florida Statutes, 1941. This office has constantly held that there is no intent in this section to cover instruments executed by the State and its political subdivisions, such as a county. I, therefore, answer your question in the negative.

I presume that you have reference to deeds of conveyance by the county of property acquired through delinquent taxes, as authorized by Section 194.25, Florida Statutes, 1941, as amended. If you have reference to conveyances of other lands by the county commissioners, your attention is called to the case of Gessner v. Del-Air Corporation, 17 So. 2d. 522, which sets forth the powers of county commissioners relative to conveyances of lands generally.

August 13, 1945.—045-251.

DOCUMENTARY STAMPS—ASSIGNMENTS OF
MORTGAGES AND DEEDS

QUESTIONS: 1. What amount of state documentary stamps is required to be affixed to assignments of mortgages whereby the whole, or any part of the indebtedness secured thereby, is assigned by the mortgagee to an assignee?

2. What amount of state documentary stamps is required to be affixed to a deed conveying real estate showing a consideration of \$2,000.00 for the equity of the grantor and reciting that the conveyance is subject to an unpaid principal balance of \$3,000.00 on an existing mortgage and also subject to unpaid taxes amounting to \$500.00?

To Honorable W. S. Weaver, Clerk of the Circuit Court, Bay County, Panama City, Florida:

1. The language of our excise tax laws on documents is not sufficiently broad and inclusive to embrace therein assignments of mortgages on real estate unless the mortgage assigned is one which incorporates "the certificate of indebtedness, not otherwise shown in separate instruments." (Section 201.08, Florida Statutes, 1941; 1943-44 Biennial Report, 227; State ex rel. Rogers v. Sweat, 113 Fla. 797, 152 So. 432). Therefore, no state documentary stamps are required on assignments of mortgages as such.

2. It appears from the above question that the grantee under the deed did not assume the payment of the existing mortgage and tax indebtedness but that the same was merely recognized as existing and the deed made subject thereto. The grantee is not personally bound to pay said indebtedness although payment of the same may be necessary to protect his property. I am therefore of the opinion that the consideration for purpose of state documentary stamps was \$2,000.00 and that \$2.00 in stamps would be the proper amount to attach.

The above answer to the second question should not be construed as covering the question in cases where mortgages and tax indebtedness are assumed by the grantee.

February 12, 1946.—046-58.

DOCUMENTARY STAMP TAX—PROMISSORY NOTES

QUESTIONS: 1. Is a promissory note, secured by a mortgage encumbering property located in this state, which note was made and delivered in another state, by a resident of this state, to a resident of another state, and which has never been physically present in this state, subject to the documentary stamp tax laws of this state?

2. Is a mortgage encumbering property located in this state, and recorded in this state, which was made and delivered, by a resident of this state to a resident of another state, subject to the documentary stamp tax laws of this state, when such mortgage contains a covenant to pay the indebtedness secured, but recites no certificate of indebtedness or promissory note bearing Florida documentary stamp taxes?

To Honorable J. M. Lee, Comptroller:

The first question must be answered in the negative upon the authority of the case of *Graniteville Manufacturing Company v. Query*, 44, Fed. 2d. 64 (affirmed in 283 U. S. 376, 51 S. Ct. 515, 75 L. Ed. 1126), which involved a South Carolina statute which was substantially the same as the Florida statute.

The second question does not admit of definite answer under the present state of the authorities upon similar propositions of law. I find no direct holding upon the question. If the mortgage in question contains a covenant to pay the indebtedness secured by the mortgage, such covenant might be considered "a written obligation to pay money" and within the purview of Section 201.08, Florida Statutes, 1941. (*Dundee Corporation v. J. M. Lee*, by the Supreme Court of Florida but not yet reported; 41 C. J. 658, Section 647; *Federal Land Bank v. Miller*, Wash., 284 P. 751; *Alropa Corporation v. McNamee*, 143 Fla. 785, 197 So. 514). Even if the mortgage was not made and executed in this state, the shipping of it to Florida and having it recorded in the public records of one of the counties may have been for the benefit of one of the parties and within the purview of Section 201.01, Florida Statutes, 1941.

Because of the uncertainty of the law in this state upon the question of the liability of mortgages containing covenants to pay the mortgaged indebtedness, to our documentary stamp taxes, when the promissory note secured by the mortgage is not subject to the tax because made and executed in other states; it is suggested, if the mortgage in question is found to have been executed in this state, or that it was shipped into this state for the benefit of one of the parties so as to come within the purview of Section 201.01, Florida Statutes, 1941, that a proceeding be brought in connection with the case in order to test the question. I feel that there is a possibility that the mortgage, if it contains a covenant to pay the mortgaged indebtedness, may be within the purview of the Florida Statute, notwithstanding the exemption of the promissory note secured by the mortgage.

February 22, 1945.—045-52.

DOCUMENTARY STAMP—DEED MADE PURSUANT TO CONTRACT

QUESTION: What is the formula to be used for determining the amount of documentary stamps to be attached to a deed made pursuant to an agreement to convey real property?

To Honorable Jess Mathas, Clerk of the Circuit Court, Volusia County, DeLand, Florida:

This matter is ruled by the terms and provisions of Chapter 201, Florida Statutes, 1941. By Section 201.02, deeds conveying lands or any interest therein are made subject to the tax at the rate of ten cents a hundred of the value of the property conveyed.

In this same section are included agreements for deeds. I do not believe the legislature intended that the same consideration involved in the transaction covered by both the agreement and the deed should be required to pay a documentary stamp tax as to each instrument.

It is my opinion that your duty under the statute is as follows:

In cases where a deed is offered for record and you find that it is made in pursuance of an agreement for deed previously made, it will be your duty to ascertain if any documentary stamps were placed upon the agreement, and, if so, to what extent. In the event that you ascertain that documentary stamps covering the entire consideration were attached to the agreement, you may record the deed without the necessity for further stamps. If, however, stamps have been affixed to the agreement for less than the entire consideration, it will be your duty to require the affixing of stamps to the deed in an amount sufficient to cover the shortage of the stamps attached to the agreement.

November 12, 1946.—046-463.

DOCUMENTARY STAMPS—CHATTEL MORTGAGE

QUESTION: What amount of documentary stamps, if any, should be placed on (a) a bill of sale absolute for sale of cattle, and (b) a chattel mortgage covering the property conveyed in the bill of sale, in the amount of \$37,500.00?

To Honorable H. T. Piety, Clerk of the Circuit Court, Highlands County, Sebring, Florida:

The title to Section 201.04, Laws of Florida, 1941, says: "Tax on bills of sale, agreements, transfers, etc., of personal property and interests therein." In the index to the Florida Statutes Annotated it refers to this Section 201.04 as tax on bills of sale, agreements, transfers, etc., however, a careful reading of this section will reveal that the heading and index are both in error; that the said section only concerns shares of stock in a corporation.

I find no law requiring stamps on absolute bills of sale.

Section 201.08, Florida Statutes, 1941, covers the amount of revenue stamps required on chattel mortgages.

In my opinion, there will be no stamps required on the bill of sale, but on the mortgage, stamps in the amount of \$37.50 should be placed thereon.

August 10, 1946.—046-357.

INTERSTATE PURCHASE ORDERS—LIABILITY FOR TAX

QUESTIONS: 1. Where a person doing business in this state sends an ordinary purchase order for the purchase of machinery, to a nonresident doing business in another state, which order is accepted in another state and the machinery shipped interstate, is such ordinary purchase order subject to documentary stamp taxes under the laws of this state, when it contains no express promise to pay for the machinery ordered and the same is shipped on open account or cash on delivery?

2. Where a person doing business in this state sends a written order for the purchase of machinery, to a nonresident doing business in another state, which order is accepted in another state and the machinery shipped interstate, is such written purchase order subject to documentary stamp taxes under the laws of this state, when it contains an express promise to pay the purchase price, or the remainder thereof, for the machinery so purchased?

3. Where the purchase price, or the remainder thereof, is evidenced by an installment purchase agreement, made and executed in this state but sent interstate to the seller, is such installment purchase agreement subject to the documentary stamp taxes under the laws of this state?

To Honorable J. M. Lee, State Comptroller:

It appears from your request for opinion, and the letter and copy of order contract accompanying it, that the prospective purchaser of any machinery sends his order for the same to the nonresident seller doing business in another state, which order, when received, is either accepted or rejected by the seller. If the order is accepted, the machinery in question is shipped interstate to the purchaser. For the purposes of this opinion, we shall presume, from your letter and the papers accompanying it, that there may be three different kinds of transactions (1) where the order contains no express agreement to pay for the machinery, that is, merely an order for machinery, (2) where the order contains an express agreement to pay for the machinery upon delivery, and (3) where the order contains an express agreement to pay for the machinery by future payments.

The documentary stamp tax of this state, when applied to interstate purchase of machinery, "is an excise tax of a familiar sort, levied with respect to the creation of instruments within the state. So laid, the tax was not imposed upon property, or upon the transfer of property, situated beyond the jurisdiction of the state... It is simply a tax levied in relation to an act done within the state in making an instrument." (*Graniteville Manufacturing Company v. Query, et al.*, 283 U.S. 376, 51 S. Ct. 515, 75 L. Ed. 1126, text 1128).

Stamp taxes have been upheld in connection with the following interstate transactions: (1) a resident of Connecticut, by a transaction in New York, sold certain shares of stock to another resident of Connecticut, held that transaction was subject to New York stamp taxes (*New York v. Reardon*, 204 U.S. 152, 27 S. Ct. 188, 51 L. Ed. 415); (2) a resident of South Carolina executed, in South Carolina, and delivered his promissory note to a payee in another state, held that the promissory note was subject to South Carolina stamp taxes (*Graniteville Manufacturing Company v. Query, supra*); (3) The Board of Trade of Kansas City, Missouri, in that city, handled certain transactions for the sale of grain, provisions and other commodities, then in interstate commerce, for certain purchasers and sellers. Under the laws of Missouri the Board of Trade was required to keep a memorandum of the transaction and place a documentary stamp thereon. The stamp tax was held valid, notwithstanding the interstate movement of the property sold and the residence of the seller or purchaser. (*Broadnax v. Missouri*, 219 U.S. 285, 31 S. Ct. 238, 55 L. Ed. 219). As to the authority of a state to tax any transaction or receipts therein, although interstate commerce may be involved, see *Treasury of Indiana v. Wood Preserving Corporation*, 313 U.S. 62, 61 S. Ct. 885, 85 L. Ed. 1188; *McGoldrick v. Berwin-White Coal Mining Company*, 309 U.S. 33, 60 S. Ct. 388, 84 L. Ed. 565, and authorities therein cited.

Documentary stamp taxes are in the nature of excise taxes rather than direct taxes (49 Am. Jur. 206, Section 2); they are levied in relation to an act done within the state in making an instrument or the transfer of an instrument. Under Section 201.08, Florida Statutes, 1941, documentary stamp taxes are levied on "written obligations to pay money" made or executed in this state. This raises the question as to whether any of the orders for the purchase of machinery mentioned in the above stated questions also contain a "written obligation to pay money" within the purview of said statute. If the written orders are, on their face, merely executory agreements to purchase and do not fix a debt, they do not seem to be within the statute (*Metropolis Publishing Company v. Lee*, 126 Fla. 107, 170 So. 442); They must be written obligations to pay a fixed debt (*Nelson v. Watson*, 114 Fla. 806, 155 So. 101; *Dundee Corporation v. Lee*, 25 So. 2d. 234).

The obligation to pay for any machinery ordered by an ordinary purchase order, as set out in the first question, would be an implied and not a written obligation to pay and not the fixing of a debt by written agreement. This would not seem to be within the statute.

I am of the opinion that the legislature intended to tax only written obligations to pay money after the passing of the consideration for such promise, and not to tax written obligations to pay for goods, wares or merchandise upon delivery. While an order for the purchase of goods, wares or merchandise containing a written promise to pay for the same upon delivery, may be within the literal wording of the statute, and for some purposes considered a "written obligation to pay money," I do not think that it was ever the intention of the legislature to tax such a transaction. I am further of the opinion that it was the intention of the legislature to tax only written obligations to pay money subsequent to the delivery of the goods, wares or merchandise forming the consideration for such promise. This seems to answer the second question in the negative.

The installment payment agreement, mentioned in the third question, seems to be a written obligation to pay a fixed debt at named future times. This would seem to be within the statute.

I am, therefore, of the opinion that the first and second questions stated above should be answered in the negative; that the third question should be answered in the affirmative. The obligation to pay the tax is that of the purchaser or person executing the obligation to pay money and not the seller or person to whom the instrument was made and delivered. The fact that the written obligation was delivered in another state does not relieve the maker of the obligation to pay the tax. The place of execution and not the place of delivery governs in these cases.

GROSS RECEIPTS TAXES, GENERALLY

March 13, 1946.—046-96.

PAYMENT BY CHECK—PROTEST

QUESTION: Should the state treasurer of Florida accept checks of foreign insurers tendered as payment under protest of the premium receipts tax required by Chapter 22671, Laws of Florida, Acts of 1945, and due on or before March 1, 1946?

To Honorable J. Edwin Larson, Insurance Commissioner:

It is assumed that (1) these checks have been received by the treasurer, have not been negotiated, and may be returned to the senders thereof; (2) that the treasurer did not in letters or other printed matter, designate the medium to be used in payment of the tax here involved which contemplated permission or invitation to make payment by check or draft as distinguished from money.

In my opinion, the above question properly is answered as follows:

It is suggested that without delay an insurer who has tendered a check in payment of this tax under protest be advised (1) that such check is not accepted or recognized as payment or legal tender of the tax due; (2) that in the absence of payment of the tax such insurer's certificate of authority will not be renewed; (3) that if the insurer will authorize the treasurer to deposit said check or proceeds of said check at once into the appropriate fund or funds of the State of Florida into which the proceeds of said tax are payable without such officer incurring possible personal liability, such check will be accepted, and certificate of authority will be renewed; and (4) that the insurer's attention be directed to Chapter 22008, Laws of Florida, Acts of 1943, and the features thereof with respect to refund permitted of taxes paid under the circumstances therein set forth.

While it does not appear likely, nevertheless should any such insurer tender to you money in payment of this tax with letter of protest accompanying the same, questions might then be raised which are not here presented, and which should be answered independent of this opinion before any action is taken by you under such circumstances.

CHAIN STORE TAXES

June 27, 1946.—046-276.

LICENSE BARRED BY COURT—REFUND

QUESTIONS: 1. Where the state comptroller collects license and inventory taxes, under Section 204.07, Florida Statutes, 1941, when barred by the limitations contained in said section as construed by the supreme court in the case of McCrory Stores Corporation v. Lee, Fla., 25 So. 2d. 567, may he make refund of such taxes under Section 204.13, Florida Statutes, 1941?

2. If refunds may not be made under said Section 204.13, may they be made under some other section of the statutes of this state?

3. Is the limitation of one year, contained in Section 215.26, Florida Statutes, 1941, applicable to the making of refunds as above?

4. If the limitation of one year, contained in said Section 215.26, is applicable, when does the right of refund accrue?

To Honorable J. M. Lee, State Comptroller:

Under Section 204.07, Florida Statutes, 1941, if any person files a false or fraudulent chain store tax return, or fails to file any such tax return, "the comptroller shall, within eighteen months of such failure or refusal, and not thereafter" proceed to collect any unpaid taxes due by such taxpayer by reason of the failure to file a tax return or the filing of a false or fraudulent one. The supreme court of this state, in the case of McCrory Stores Corporation v. Lee, 25 So. 2d. 567, held the said eighteen-month period to be a statute of limitations against the collection of any additional tax after the running of said period of time. The said eighteen-month period appears to be a statute of limitations and not a statute of nonclaim.

Section 204.13, Florida Statutes, 1941, authorizes the comptroller to make refunds "in case of overpayment" of chain store taxes; and Section 215.26, Florida Statutes, 1941, authorizes the comptroller to make refunds of (a) an overpayment of any tax, (b) a payment where no tax due, and (c) any payment made into the state treasury in error. See also Sections 193.40, 199.31 and 200.36, Florida Statutes, 1941, for similar statutes.

The questions above stated presuppose that a tax has been collected by the comptroller, under Section 204.07, Florida Statutes, 1941, after the running of the statutory period mentioned therein. This seems to raise the question as to whether such a payment of a tax is an overpayment, a payment when no tax due or a payment into the state treasury in error.

Statutes of limitations do not operate upon the indebtedness but merely intercept the remedy on the indebtedness when pleaded, and to be effective they must be pleaded, and are usually waived if not pleaded. (Danielson v. Line, 135 Fla., 585, 185 So. 332, Green v. Rou, 56 Fla. 319, 48 So. 207; Bowery v. Babbitt, 99 Fla. 1151, 128 So. 801; 34 Am. Jur. 20, 314, 318, 322, 337, 338, Sections 11, 400, 405, 410, 428). The said statute of limitations merely bars the remedy which the comptroller may pursue; the tax remains due and payable and its collection may be barred by setting up the statute of limitations. The payment of the tax, whether upon demand by the comptroller or otherwise, after the running of the period of limitations, was nonetheless a payment of a tax due and was neither an overpayment of a tax, a payment where no tax was due nor a payment made in error. This being true, the payment of the tax under Section 204.07 does not come within the purview of either Section 204.13 or Section 215.26, Florida Statutes, 1941.

Having reached the above conclusion concerning the taxes in question:

1. The first question must be answered in the negative.
2. The second question must likewise be answered in the negative.
3. Having answered the above questions in the negative, no answers for the third and fourth questions are required.

April 22, 1946.—046-167.

RACE TRACK SHOPS—CLASSIFICATION

QUESTION: Do liquor bars, restaurants, chowder counters, lunch counters, soda fountains, cigar stands, and other concessions within a race track enclosure constitute a chain store when operated by or under the control of the same management, supervision or ownership?

To Honorable J. M. Lee, State Comptroller:

Under the statutes of this state a "chain store" is a group or chain of two or more stores or mercantile establishments, whether stationary or movable, under the same management, supervision or ownership; except "restaurants, cafes, cafeterias, hotels and liquor stores." (Section 204.01, Florida Statutes, 1941).

Restaurants have been defined as places where refreshments, food and drinks are served for consumption on the premises. (Black's Law Dictionary, 3rd. Ed. 1547; 37 Words and Phrases 438-443; Annotation in 122 A. L. R. 1399). Whether the guests are seated at a table or on a stool at a counter does not affect the definition. (State v. Shoaf, 179 N. C. 744, 102 S. E. 705). Establishments where lunches, wieners and sandwiches are served at a counter have been classified as restaurants. (State v. Shoaf, *supra*; Manesis v. Sulunias, 150 a. 315, 103 S. E. 459; People v. Kupas, 13 N. Y. S. 2d. 488; Campbell v. Weathers, 153 Kan. 316, 111 P. 2d. 72). Shops for the sale of tobaccos, cigars, cigarettes and the like have been held not to be restaurants. (State v. Hogan, 30 N. H. 268; Donahue v. Conant, 102 Vt. 108, 146 A. 417).

It, therefore, appears that the liquor bars (presuming that they have been duly licensed by the state beverage department), restaurants, chowder counters and lunch counters are within the exception in Section 204.01, Florida Statutes, 1941, and are not chain stores. The soda fountain and cigar stands, and any other such concessions not within the said exemption, may constitute chain stores. It appears from the exhibits furnished us with your request, that the cigar stands are under the same cover with the restaurant and bar but are not actually connected therewith.

Mercantile establishments, to constitute chain stores, need not be separated by any great distance; it makes no difference whether they be in separate cities in separate blocks in the same city, within the same city block, or within any other area, so long as they are operated as separate establishments under the same management, supervision or ownership. I see no reason why a soda fountain and several cigar stands may not constitute a chain store when operated under the same management, supervision or ownership with the cigar stands.

This seems to answer the question above stated, partly in the negative and partly in the affirmative.

LICENSES TAXES

March 29, 1946.—046-120.

COUNTY TREASURY—CLAIM

QUESTION: May any or all of the several counties of the state contribute to the expenses of James M. Owens, Jr., incurred in connection with his efforts to obtain a change in the manner of distribution of the intangible tax funds for certain years so that the counties would receive a larger share of the said funds?

*To Honorable Charles W. Luther, Attorney for County Commissioners,
Volusia County, Daytona Beach, Florida:*

No claim may be charged against a county treasury or be paid therefrom, except where the law, either expressly or by necessary implication, imposes an obligation on the county or empowers it to contract therefor. No officer of a county has power to charge it with the payment of a claim, however meritorious or whatever the benefits, unless duly authorized by law (20 C. J. S. 1052, Section 207). No contract may be implied where a person, without the knowledge, direction or assent of the proper county authorities, voluntarily performs services for the county (20 C. J. S. 1049, Section 204). Charges against a county must be authorized by law and no officer may bind the county unless there is authority given him by law (Nassau County v. Downie, 16 Fla. 171).

It is my impression, from the facts set out in the request, that Volusia county has no contract obligation, either expressed or implied, to pay anything toward the expenses of James M. Owens, Jr. For the county to be liable, there must be an express or implied agreement between the county commissioners and Mr. Owens for such payment. The mere fact that the county may have received some benefit from Mr. Owens' work does not appear to be sufficient to obligate it.

I am further of the opinion that the claim cannot be paid, even if there be such a contract, unless within some budgeted item set up in the county budget.

October 24, 1945.—045-332.

RACE TRACK MEETS AND AMUSEMENT ENTERPRISES

QUESTIONS: 1. What statutes relate to midget automobile racing in this state?

2. What statutes govern occupational licenses for the operation of midget automobile racing in this state, and who is charged with the collection of the taxes for such licenses?

3. What statutes govern occupational licenses for the operation of legalized dog racing in this state, and who is charged with the collection of the taxes for such licenses?

4. Are there any statutes regulating the distances to exist between dog race tracks in active operation?

To Honorable John R. Jones, Tax Collector, Pensacola, Florida:

With reference to midget automobile racing, your telegram is not very clear as to whether you have reference to the racing of automobiles of small or midget size by professional or nonprofessional drivers, or to an amusement device in the form of small automobile-like carriages or vehicles, driven by electric motors or other power, used and operated in an enclosure for the amusement of persons riding in them.

1. If racing of automobiles of midget size by professional or non-professional drivers is intended, then Chapter 549, Florida Statutes, 1941, regulating automobile racing meets, should be complied with. It is made the duty of the sheriff of the county to see that this statute is enforced.

2. (a) If racing of automobiles of midget size for the entertainment of the public is intended, then the same would be classified as an amusement device, contrivance or facility, requiring an occupational license, under Sections 205.21, 205.31, 205.32, or 205.60, Florida Statutes, 1941, depending upon the method, means and place of operation. If this falls within the purview of Sections 205.31 and 205.32, then a permit from the State Comptroller is required.

(b) If the operation of midget automobile-like carriages or vehicles, for the amusement of persons riding in them, is intended, and such amusement is conducted in an enclosure, then they would come under Sections 205.31 and 205.32 or 205.60, Florida Statutes, 1941, likewise depending upon the method, means and place of operation. They likewise require a permit from the comptroller, if they come within the purview of Sections 205.31 and 205.32.

(c) In either of the above cases the license tax should be collected by the county tax assessor (see Sections 205.01-205.14, Florida Statutes, 1941).

3. Chapter 550, Florida Statutes, 1941, governs horse and dog racing in this state, and Sections 550.07, et seq., provide for the licensing of such racing by the State Racing Commission. Chapter 550 was taken from Chapter 14832, Acts of 1931, concerning which the supreme court of the state said, "was intended to cover the subject of regulation, licensing and excise taxation of the operation of race tracks in Florida, and prescribe one rule of excise taxation for the operation of race tracks throughout the state . . . The statute defines a state policy for uniformly regulating, licensing and excise taxing the operation of race tracks throughout the state." (*Town of Hallandale v. Broward County Kennel Club*, 10 So. 2d. 810, text 811 and 812). These taxes constitute excise and occupational taxes and are not within the exception of fees and licenses mentioned in Section 205.13, Florida Statutes, 1941. I am, therefore, of the opinion that the excise and occupational licenses provided in Chapter 550, Florida Statutes, 1941, are exclusive and that no licenses are required under Chapter 205, Florida Statutes, 1941, for the operation of horse and dog race tracks. Taxes and license fees under Chapter 550 are collected and enforced by the racing commission, and not by the tax collectors.

4. Section 550.05, Florida Statutes, 1941, provides that no permit may be issued by the racing commission, or voted upon, to conduct a dog race track at a location within twenty miles of another location for which a permit has been issued and a racing plant located, with certain exceptions as to tracks already located.

The amounts of the license taxes and fees for the above occupations are set out in the statutes, some of which depend upon population.

July 19, 1945.—045-193.

STATE BANKS—OCCUPATIONAL LICENSE TAXES

QUESTION: Is the Bank of Mulberry exempt from paying occupational license tax and personal tax to the city of Mulberry, said bank being a state bank?

To the City of Mulberry, Florida:

Upon the basis of Chapter 21842, Acts of 1943, all banks, trust companies and Morris Plan Banks, now or hereafter chartered under the laws of the State of Florida, became entitled to the same immunity from state and local taxation that national banking associations have from time to time under the statutes of the United States, and the described immunity applies to the taxes mentioned by you. The bank is, therefore, exempt from the payment thereof.

August 3, 1945.—045-216.

FRATERNAL BENEFIT SOCIETIES

QUESTION: What amount of license tax, if any, is payable by a fraternal benefit society doing business under the provisions of Chapter 637, Florida Statutes, 1941, as amended, for a period from the effective date of Chapter 22671, Laws of Florida, Acts of 1945, to October 1, 1945, under the provisions and requirements of said Chapter 22671?

To Honorable J. Edwin Larson, Insurance Commissioner:

The above Chapter 22671, among other things, imposes a license tax of \$200.00 annually upon all insurers operating in Florida, including fraternal benefit societies doing business under the provisions of Chapter 637, Florida Statutes, 1941, as amended. Section 1 (1) of Chapter 22671 provides that such a license tax shall be payable at the time set forth in Section 205.04, Florida Statutes, 1941.

Section 205.04 provides that all licenses shall be payable on or before the first day of October of each year unless otherwise provided by law, "and except as may be otherwise provided by law any person who was not liable for a license during the first half of a license year may be issued a license during the second half of the license year upon the payment of one-half the amount fixed as the price of such license for one year."

While Section 1 (1) of Chapter 22671 goes no further than to state, as aforesaid, that license taxes required by said chapter are payable at the time set forth in Section 205.04, it would seem obvious that nothing in Chapter 22671 in any way repeals or modifies the quoted half-year provisions of Section 205.04.

Prior to enactment of Chapter 22671, a fraternal benefit society was not required to pay a license tax. The \$10.00 fee paid by such a society to the insurance commissioner for each statement made by the society and accepted by the commissioner was not then and is not now a license tax. Chapter 22671 became a law subsequent to the first half of this license year. For this reason, such society is entitled to the quoted advantage provided by Section 205.04.

In view of the foregoing, it would appear your question is properly answered as follows:

A fraternal benefit society operating under Chapter 637, Florida Statutes, 1941, as amended, is required to pay to the state treasurer a license tax of \$100.00 for the remainder of this license year.

December 12, 1945.—045-386.

INSURANCE—BLIND SOLICITORS

QUESTION: Does our law provide an exemption from the payment of the state and/or county occupational license tax by, or for, a blind insurance solicitor?

To Honorable J. Edwin Larson, Insurance Commissioner:

Section 205.45, Florida Statutes, 1941, as amended by Chapter 22737, Laws of Florida, Acts of 1945, in effect requires each insurance agent who employs insurance solicitors to pay the state and county tax imposed with respect to such solicitors to the state treasurer at the time and as required by said law.

Since it appears that the payment of such tax under said law is laid upon the agent and not the solicitor, it seems it is unnecessary to decide whether a blind person is included among any of the persons exempted from the payment of license tax under the conditions and within the limitations set forth in Section 205.45, Florida Statutes, 1941.

In view of the foregoing, it appears that the above question properly is answered in the negative, i.e., that an agent is not exempted by law from payment of the state and county license tax imposed by said amended Section 205.45, Florida Statutes, 1941, with respect to one of his insurance solicitors who is blind.

November 16, 1946.—046-476.

INSURANCE PREMIUMS—DEFINITION—WHEN TAXABLE

QUESTIONS: 1. Are dividends payable under life insurance policies and which, without option of the holders of such policies, by the terms of the policy are applied to purchase paid-up additions, insurance premiums which are taxable under Section 205.43, 1945 Supplement to Florida Statutes, 1941?

2. Are dividends payable under insurance policies and which, at the option of the holders of such policies, may be and are applied to purchase paid-up additions, insurance premiums which are taxable under Section 205.43, 1945 Supplement to Florida Statutes, 1941?

3. When the payment of premiums by an insured is waived under disability provisions in an insurance policy, are such waived premiums taxable under Section 205.43, 1945 Supplement to Florida Statutes, 1941?

4. In allowing the credits contemplated by Section 205.44-1, 1945 Supplement to Florida Statutes, 1941, should the ratio of Florida premiums to total premiums, which is the basis of the deduction allowed, be computed on the basis of all direct premium writing, as shown in Schedule T of the annual statement of life insurance companies required by the insurance commissioner, or only upon the totals allocated, by states and other taxation units, excluding dividends and waiver of premiums?

5. In computing the aforesaid credits allowed by said Section 205.44-1, should a separate calculation be made in case of considerations for annuities?

To Honorable J. Edwin Larson, Insurance Commissioner:

(1) Section 205.43 (2), 1945 Supplement to Florida Statutes, 1941, provides, in effect, that in addition to the license tax required of insurers by the preceding part of said Section 205.43, each insurer annually, and on or before March 1st of each year shall pay to the state treasurer a tax on insurance premiums, assessments, etc. as in said law provided, in an amount equal to two per cent, of such premiums, assessments, etc., received during the preceding calendar year, "omitting premiums on reinsurance accepted, and less return premiums or assessments, but without deductions for reinsurance ceded to other companies, and without deductions for money paid upon surrender of policies or certificates for cash surrender value, and without deductions for discounts or refunds for direct or prompt payment of assessments, and without deductions on account of dividends of any nature or amount paid and credited or allowed to holders of insurance policies, certificates," etc.

The theory that such a dividend, in the form of paid-up insurance as contemplated by this question, represents a taxable premium under said Section 205.43 (2) would seem to derive from the position that the transaction involving the application of the "dividend" to additional paid-up insurance is an independent transaction separable from the transaction involving the payment of premiums required under the policy; that dividends applied to purchase paid-up additions, although arising from a larger premium than would be charged for a similar non-participating policy, are not the exact equivalent of the excess premium; that interest earnings, savings in mortality and loadings, and other sources of gain or loss enter into the calculations of dividends earned, according to groupings and actuarial practice. Such a theory, and the reasons for it, are not to be treated lightly.

However, it is elementary that tax statutes are construed strictly against the state and in favor of the taxpayer. With this in mind, it is considered to be the better position that such dividends applied to

purchase additional paid-up insurance are not premiums received, within the intent and meaning of said Section 205.43 (2), but that the additional insurance represents that which under the terms of the participating policy is issuable to the policyholder in consideration of the premium required to be paid under the terms of such policy, which premium is subject to the tax prescribed by said Section 205.43 (2). By the provisions of the law, such a dividend may not be deducted by the insured from taxable premiums collected; and it is not considered to have been the legislative intent that under policies of the type here considered, they should be taxed.

You have called to my attention one case directly upon the point here involved, and I have been unable to find any other. In that case, *The Prudential Insurance Co. vs. Green*, 231 Ia. 1371, 2 N. W. 2d. 765, the effect of the decision is to sustain the position set forth in the last paragraph above. The case of *Mutual Benefit Life Insurance Co. vs. Fischer, et al.* (Ia), 17 N. W. 2d. 1847, involved the question concerning application of dividends to shorten the premium paying or endowment period; and the effect of such decision was that under the Iowa law, dividends so used were not taxable premiums.

For the reasons stated above, in my opinion, dividends payable in pursuance of participating policies, and by the terms of which are applied to purchase paid-up additions, do not constitute premiums received by an insurer which are taxable under said Section 205.43 (2); and, hence, this question is answered in the negative.

(2) Whether such a participating policy fixes the application of dividends to paid-up insurance, or grants to the policyholder the option of applying it to such purpose, would seem immaterial. In either event, for the reasons above set forth, the additional insurance would appear to be in pursuance of the policy and the consideration therefor would derive from the premium paid under the terms of the policy. Hence, it would seem that properly this question is answered in the negative, as is the first question.

(3) Taxable premiums under said Section 205.43 (2) are premiums "received during the preceding calendar year." Where, under provisions of a policy, payment of premiums is waived in so far as the insured is concerned during his disability, it is not considered that there is such a payment of premium by the insurer as to constitute a premium received and, as such, taxable under said Section 205.43 (2). Hence, in my opinion, under such circumstances, no taxable premium is involved in such a transaction, and this question is answered in the negative.

(4) Section 205.44-1, 1945 Supplement to Florida Statutes, 1941, provides, in effect, that insurers therein described shall have the privilege, at their option, of taking credit against the payment of any premium receipts tax owed by them to the State of Florida, for a sum of money equal to the proportion or percentage of said premium tax which the proportion or percentage of the total amount of premiums received from policyholders upon insurance and annuity contracts, in the state, bears to the total amount of all premiums received by the insurer from all policyholders upon insurance and annuity contracts wheresoever written or issued.

Whether or not insurers in setting forth direct writings for the several states, as required by Schedule T of the annual statement, limit such report to the taxable premiums received in the several states, is not known to me. However, in calculating the optional credits provided by Section 205.44-1, the same basis for establishing the premiums received on insurance and annuity contracts from policyholders in this state must be used to establish the total amount of premiums received by the insurer from all such policyholders wheresoever written. Hence, if the direct writings reported for the several states as set forth in Schedule T is limited to taxable premiums under the laws of the several respective

states, such figures cannot be utilized unless the basis for fixing the taxable premium by such states is the same as that found in said Section 205.43 (2), which is unlikely.

We are here dealing with premium taxes. The manner of ascertaining the amount of taxable premiums in the state is fixed by said Section 205.43 (2). It would seem reasonable, in the absence of other particularization, that the wording in said Section 205.44-1, "which the proportion of percentage of the total amount of premiums received, from policyholders upon insurance and annuity contracts, in this state," contemplates **taxable premiums** as fixed in our law. Using that basis of calculation for business in this state, of necessity premium receipts from all policyholders wheresoever written or issued must be computed on the same basis.

In view of the foregoing, in my opinion the premium receipts contemplated by said Section 205.44-1, are those receipts which, if collected in this state, would constitute taxable premiums under said Section 205.43 (2).

(5) In my opinion, since the rate of tax prescribed by said Section 205.43 (2) on insurance premiums and annuity premiums or contributions is different, it would seem that a separate calculation to establish the credit contemplated by said Section 205.44-1 would be required to be made with respect to such annuity premiums or considerations.

November 14, 1945.—045-356.

VETERANS—EXEMPTION FROM TAX—INSURANCE AGENTS AND SOLICITORS

QUESTION: Are disabled veterans of the Spanish American War and World Wars I and II, as described and defined in Section 205.16, Florida Statutes, 1941, as amended, entitled to exemption with respect to state and county license taxes imposed by Section 205.45, as amended, upon insurance agents and solicitors?

To Honorable J. Edwin Larson, Insurance Commissioner:

Originally, Section 205.16, Florida Statutes, 1941, referred only to disabled veterans of World War I and the Spanish American War. By Chapter 21654, Acts of 1943 (Section 205.16 (6), 1943 Supplement to Florida Statutes, 1941), disabled veterans of World War II were granted the same exemptions as those provided for such veterans of the other wars named.

Section 205.45, Florida Statutes, 1941, provided for the occupational license taxes required to be paid for insurance agents or solicitors. Chapter 22737, Laws of Florida, Acts of 1945, amended said Section 205.45, requiring that the tax theretofore payable to the counties should thereafter be paid directly to the state treasurer, and by such official distributed to the appropriate counties, as in said act provided. Reference hereinafter to Section 205.45 shall be understood to refer to said law as amended by Chapter 22737, above mentioned.

Section 205.45, in effect, requires each insurer who sells or writes insurance through or employs agents in this state, to pay the state and county tax at the time and in the amounts therein required. Section 205.45 requires each agent who employs insurance solicitors to pay the state and county tax imposed with respect to solicitors to the state treasurer at the time and as required by said law. It is noted that neither insurance agents nor solicitors are **themselves** charged with the payment of occupational license taxes.

The exemption provisions of above Section 205.16, as amended, would appear to apply to disabled veterans, as therein defined and described, who apply for license and, who engage in a "business or occupation in the State of Florida which may be carried on mainly through the per-

sonal efforts of the licensee as a means of livelihood" up to but not in excess of fifty dollars with respect to state, county and municipal license taxes. It would seem that these exemption provisions are applicable to a disabled veteran, as defined in said law, when (1) he is an applicant for license and is the prospective licensee, and (2) he is charged with payment of the tax.

In view of the foregoing, it would appear that the above question properly is answered as follows:

Since neither an insurance agent nor an insurance solicitor is charged with the payment of the state and county license tax imposed by said Section 205.45, it would seem that the exemption provisions of said Section 205.16, as amended, are not applicable to a disabled veteran, as defined in said latter law, with respect to such license taxes.

October 17, 1946.—046-448.

DISABLED VETERANS—EXEMPTION—AMOUNT

QUESTION: Does the law entitle a disabled veteran to \$50 occupational license tax exemption in municipal, county and state licenses?

To the Veterans' Service Committee, Melbourne, Florida:

Section 205.16, Florida Statutes, 1941, as amended by Chapter 22664, Laws of Florida, 1945, provides for an occupational tax exemption up to the sum of \$50 in those businesses and occupations which may be carried on mainly through the personal efforts, for a livelihood, by those of the Spanish-American War who served between April 21, 1896 and July 4, 1902, and of World War I between April 6, 1917 and November 11, 1918, and World War II between December 7, 1941 and the close thereof, provided such veterans are bona fide permanent resident electors of the State of Florida having ten per cent or more disability and were honorably discharged from the military service.

The above should answer your question as to what veterans are entitled to the benefits of the law.

Reading the history of Section 205.16, supra, it is important to observe that in Chapter 16299, Laws of 1933, the license was to issue to the veteran without charge if the combined state, county and municipal license tax did not exceed \$25, that if the combined or aggregate exceeded \$25, the veteran was to receive credit to the amount of \$25 and the balance was to be paid in cash and divided proportionately between the state, county and municipality. In 1935 the legislature, Chapter 17476, made material changes in the law, providing that the license should issue without charge to the veteran if the state, county or municipal license tax did not exceed \$50 and if the state, county or municipal license tax exceeded \$50 the veteran was entitled to an exemption to the extent of \$50 on any license and that in the event either the state, county or municipal license tax exceeds \$50 the remainder of such license tax in excess of \$50 shall be paid in cash.

In my opinion the \$50 exemption applies to each license, that is, if the state license is \$50, the county license \$50 and the municipal license \$50, the qualified veteran is entitled to his credit of \$50 on each of the licenses.

January 10, 1946.—046-10.

EATING PLACES IN HOTELS

QUESTION: Are restaurants, cafes, coffee shops and other eating places required to pay a license fee and procure a license, under chapter 205, Florida Statutes, 1941, when operated in hotel buildings but not in conjunction with the business of the hotel?

To Honorable Earnest Overstreet, Tax Collector, Dade County, Miami, Florida:

Restaurants, cafes and other eating places are subject to taxation under Section 205.34, Florida Statutes, 1941, which was added to the laws of this state in 1941. This statute provides in part as follows: "Every person engaged in the business of operating a restaurant, cafe, or other public eating place (whether operated in conjunction with some other line of business or not, except dining rooms in hotels) shall pay a license tax." The exception of "dining rooms in hotels" contained in the above quoted provision of the statute means dining rooms operating and conducted by hotels in conjunction with their hotel business primarily for the convenience of their guests. Before any eating place may claim this exemption it must be operated by the hotel in conjunction with its hotel business and primarily for the convenience of the guests of the hotel. Eating places operated in hotel buildings, not in conjunction with the business of the hotel, are required to pay the license tax.

March 18, 1946.—046-105.

CYPRESS GARDENS—EXEMPTION

QUESTION: Are persons, firms and corporations, having enclosed grounds, exhibits, etc., such as the Cypress Gardens, Inc., who make a charge for admission, subject to a license tax under Section 205.49, Florida Statutes, 1941, or any other section of the Florida Statutes, 1941?

To Honorable J. M. Lee, State Comptroller:

There seems to be no express exemption of such businesses mentioned in the statutes (see Sections 205.15, 205.19, Florida Statutes, 1941). I see no distinction between the business of operating Cypress Gardens and similar properties and the operation of any other amusement device when the same is operated for profit and not in connection with some charity or similar purpose. Although there appears no statute expressly relating to the businesses in question, it appears that Section 205.49 was intended to cover businesses not expressly provided for in the statute.

I am, therefore, of the opinion that the above question should be answered in the affirmative and that the license fee for such businesses will be that provided by said Section 205.49.

February 27, 1946.—046-80.

TIP SHEET TAXED

QUESTION: Should the "Top 6 Handicappers Guide" published in Miami Beach, Florida, be taxed under Chapter 20731, Laws of Florida, Acts of 1941, or under some other license taxing law?

To Honorable Earnest Overstreet, State and County Tax Collector, Miami, Florida:

In order to answer this question we must determine whether the said "Top 6 Handicappers Guide" is a "tip sheet" or a "newspaper," within the purview of said Chapter 20731. The said "Top 6 Handicappers Guide" is published every Monday and is sold and distributed to persons interested in racing of horses and other animals. By the written indication printed on the guide itself it is "a listing of jockeys, trainers, owners, stallions, sires and breeders that have proved to have winning qualities" and is intended "merely to aid the handicappers by having these listings (listings in the guide) at their finger-tips" and as an "aid to be applied to" the handicapper's own figures. The guide recites that "anyone of these jockeys, trainers, owners, stallions, sires or breeders

(meaning the ones mentioned in the guide) may be the missing link in making the proper selection." The listings in the guide are "good for one week" and handicappers are advised to "get the new listings every Monday." Guides appear to be available at news stands and by mail. A recent guide contained "listings for week beginning Monday, February 4, 1946, Hialeah Park, Florida."

Under the terms of Chapter 20731, Laws of Florida, Acts of 1941, a "tip sheet" may be either printed or oral, and may be either a "prediction," "selection" or "indication" of the "result of any trial or contest of skill, speed, power or endurance of man, beast or fowl," including what is usually referred to as a "racing tip." In my opinion the information contained in the copy of the "Top 6 Handicappers Guide" is either a prediction, selection or indication of the result of a horse race, which is accomplished by furnishing to the general public a listing showing the standing of horses or other animals in races already run which is used as a prediction, selection or indication of what may be expected in future races when such animals are entered in them. There is a new group of predictions every week by a new publication of the guide. (In this connection see definitions used in Chapter 20731; *Armstrong Racing Publications v. Moss*, 43 N. Y. S. 2d. 171; 38 Words and Phrases, 529 and 530; definitions of "tip", "predictions", "selection", "indication" and "indicate", Webster's Dictionary).

I am, therefore, of the opinion that the copy of "Top 6 Handicappers Guide" is within the purview of Chapter 20731, Laws of Florida, Acts of 1941, and should be licensed under said chapter as a "tip sheet" and not as a newspaper.

August 3, 1946.—046-332.

LIFE INSURER—OUT-OF-STATE CONTRACTS

QUESTIONS: Is a life insurer, organized and at this time, authorized to do business only in the State of Florida, correct in considering the following classes of business as "Florida business" for the purpose of computing the percentage of credit to which the insurer may be entitled under Section 205.44-1, 1945 Supplement to Florida Statutes 1941 (Chapter 22749, Laws of Florida, Acts of 1945):

- (1) Business applied for by mail by residents of other states (these policies being typed at the home office in Florida and delivered to the applicant by mail); and
- (2) Business originally written for insureds in Florida who have moved to other states, and who now remit premiums by mail from other states?

To Honorable J. Edwin Larson, Insurance Commissioner:

It is apparent that contracts of insurance prepared and closed in this state by an insurer upon applications received by mail from other states without the intervention of agents in such other states, and premiums received by an insurer in this state from policyholders in other states without the intervention of agents in other states, constitute engaging in the insurance business in this state. In the absence of statutes bearing upon the subject in such other states, it seems to be the better rule that such activities do not constitute the engaging in the insurance business in such other states. *New York Life Ins. Co. vs. Dodge*, 246 U. S. 357, 62 L. Ed. 772; *Allgeyer vs. Louisiana*, 165 U. S. 578, 41 L. Ed. 832. However, whether or not premiums received in Florida from other states on contracts of this insurer under the circumstances reflected in the above inquiries are subject to the tax prescribed by Section 205.43, 1945 Supplement to Florida Statutes, 1941, or may be considered as Florida business in figuring the credit permitted by said Section 205.44-1, must depend upon the wording and intent of such statutes.

Above Section 205.43 as now found in the 1945 Supplement, is Chapter 22671, Laws of Florida, Acts of 1941, which repealed original Section 205.43, and changed such original law, as related to premium receipts taxes on insurance contracts, only to the extent of including in its coverage insurers not theretofore embraced thereby. Said original Section 205.43, Florida Statutes, 1941, as incorporated in such revision was derived from Sections 1182 and 1182 (1), Compiled General Laws.

It is not too clear from Section 205.43, 1945 Supplement, that premiums received on life policies are taxable under said law only if received from policyholders who are in Florida; yet that would seem to be the reasonable construction of the wording of such law, and such construction is fortified by the clearer wording of our premium receipts tax law as it formerly appeared in the above sections in the Compiled General Laws, in which it was stated, without break or punctuation (Said Section 1182, C. G. L.), that said tax was "two per cent of the gross amount of receipts of premiums from policyholders in Florida." And it would seem that the wording of said Section 205.44-1 with respect to tax collectible on premiums from life policies in Florida should receive like construction.

The rule with respect to premiums collected on policies or other contracts on property or business in this state executed by fire or marine insurance companies, surety companies and policies or other contracts of indemnity coverage, is made more explicit by Section 626.24, Florida Statutes, 1941.

In view of the foregoing, in my opinion the two inquiries above are properly answered as follows:

Premiums received by an insurer in Florida on life policies under the circumstances appearing in both the inquiries above are not subject to the premium receipts tax imposed by said Section 205.44, and it would seem that such premiums may not be considered as "premiums received, from policyholders upon insurance . . . contracts, in this state . . ." under the provisions of said Section 205.44-1.

September 13, 1946.—046-384.

FACTORY REPRESENTATIVES—BRANCH LICENSE

QUESTION: Is a motor car manufacturing company, the factory and factory branches of which are located without the State of Florida, employing representatives who transact the manufacturer's business within the State of Florida, required to secure a manufacturer's or factory branch license in addition to licenses secured for each of its factory representatives under the provisions of Chapter 20326, Laws of 1941?

To Honorable George H. Asbell, Motor Vehicle Commissioner:

It would appear from the facts presented that the automobile manufacturing company in question maintains its place of business in the State of Michigan and has established a factory branch in the State of Georgia. It further appears that it employs representatives who direct its business transactions with dealers within the State of Florida. The quoted statute provides that no manufacturer, factory branch or factory representative shall engage in business as such in this state without securing a license therefor. Since it would appear that neither the manufacturer nor the factory branch in question is engaged in the conduct of business within the State of Florida, the statute does not require the securing of a license. The statute does require that each factory representative shall secure a license in the manner prescribed by the act. The question is accordingly answered in the negative.

August 23, 1946.—046-368.

COURSING DOGS—TRAINER—LICENSE

QUESTIONS: 1. What state and county occupational license should be required of one conducting the business of training dogs to be coursing dogs, by the use of live rabbits with an escape pen?

2. May an additional occupational license be required of such person when spectators are admitted to the training field or area for a fee to observe such training and the chasing of the rabbits by such dogs while in training?

To Honorable J. M. Lee, State Comptroller:

The above questions present the issue as to whether the training of dogs to be coursing dogs is a business or profession within the purview of any section of Chapter 205, Florida Statutes, 1941, or any other statute of this State providing for and requiring a license. They also seem to present the further question as to the effect of charging an admission to permit the general public to watch the training of the dogs. The word "coursing" is defined in Webster's New International Dictionary as "the pursuit of running game with dogs that follow by sight instead of scent." It is presumed, for the purpose of this opinion, that the said training of coursing dogs has no connection with the business of operating a race track so as to require a license under Section 550.10, Florida Statutes, 1941. Under Section 550.10, Florida Statutes, 1941, an occupational license is required of trainers in connection with the operation of race tracks. This would indicate that the legislature considered that a person acting as a trainer for a race track was engaged in either a profession or a business when acting in that capacity in this state. A "trainer" is defined in the dictionaries as one who trains animals for trials of speed, etc. In order for one to be a trainer of animals, it would seem that he would be required to have certain knowledge and skill in preparing the animal for trials of speed, endurance, etc. The distinction between a "profession" and a "business" is not always easy to determine; in many cases the line of demarcation is not clear and there may be an overlapping of the two in some cases. It has been said that a profession is purely personal, depending upon the art and skill of the individual, while a business is not so dependent upon the skill and art of the individual. The term "business," as used in the license laws, is usually held to mean a business, occupation or trade in a commercial sense, carried on with a view of profit or livelihood and embraces anything about which a person may be employed (37 C. J. 215, Section 70; 5 Words and Phrases 972 et seq.; 34 Words and Phrases 201 et seq.).

The only case that I have been able to find that appears to approach the question is the case of *Bradford v. Federal Tax Commissions*, 34 Austr. C. L. R. 1, 7, in which the Australian court held that a trainer of race horses was not engaged in a profession. If I correctly understand the questions above stated, the trainer in question holds or will hold himself out to the public as a person who will perform some service for them (that is, train their dogs to be coursing dogs) in return for a consideration. His business or occupation would seem, therefore, to be that of performing services for the public in return for a consideration. This would appear to bring him within the purview of Section 205.53, Florida Statutes, 1941.

Although your question makes reference to a school for the purpose of training dogs, I do not think that license taxes are within the purview of the tax exemption provisions contained in Section 192.06, Florida Statutes, 1941, and Section 1, Article IX, of the state constitution, providing exemption from general taxes of property used for municipal, educational, literary, scientific, religious and charitable purposes (37 C. J. 236, Section 89).

It appears from the second question that the person performing the business of training dogs will also provide for the admission, for a fee, of spectators to the training grounds for the purpose of watching the dogs in action during training. Evidently the chasing of live rabbits by the dogs in training will constitute somewhat of an amusement or recreational device, contrivance or facility for the spectators in question. It does not appear from the request for opinion that the training grounds would be of temporary location but that they would be permanently located. This would seem to bring them within the purview of Section 205.21, Florida Statutes, 1941 (See *State v. Wood*, 136 Fla. 341, 186 So. 420; *State v. Wood*, 140 Fla. 185, 191 So. 769; *State v. Wood*, 145 Fla. 296, 199 So. 262).

Where separate and distinct occupations or professions are pursued by the same person, a separate license tax may be imposed for each occupation or profession, notwithstanding they are combined in one general business (37 C. J. 210, Section 62; *Bentley-Gray Dry Goods Company v. City of Tampa*, 137 Fla. 641, 188 So. 758).

I am, therefore, of the opinion that question one should be answered by stating that an occupational license under Section 205.53 Florida Statutes, 1941, would be required, provided the trainer is not paying a license tax under Section 550.10; that the second question should be answered in the affirmative and that a license under Section 205.21, Florida Statutes, 1941, would also be required.

August 9, 1946.—046-348.

PROFESSIONAL ATHLETIC TEAM—TAX EXEMPTION

QUESTION: Are professional football and baseball teams, operating as corporations for profit in this state, subject to the occupational license tax statutes of this state?

To Honorable J. M. Lee, State Comptroller:

License taxes are required, under the statutes of this state, of persons who "operate for profit any game, amusement or recreational device, contrivance or facility" (Section 205.21), "engage in the operation of any business" not otherwise licensed (Section 205.49), or "engage in the practice of any profession, whether or not that profession be regulated by law" (Section 205.52). In the interpretation of statutes, words in common use are to be construed in their natural, plain and ordinary significance unless it appears that they were used in a technical or other sense. (*State v. Tunncliffe*, 98 Fla. 731, 124 So. 279, text 281.)

The three sections of the statutes above mentioned provide that license taxes are required of persons operating any game, amusement or recreational device, contrivance or facility for profit, persons operating a business, and persons engaging in a profession. Professional football and baseball teams are organized and operated primarily for profit and only secondarily for the amusement of the public. They are organized for the purpose of playing games for profit. They operate the business of playing ball games for profit, and in many instances their ball players make ball playing a profession. Prior to the adoption of Chapter 18011, Laws of Florida, Acts of 1937, the statutes designated certain professions and businesses against which license taxes were to be levied. In 1937 the legislature, instead of attempting to designate the professions and businesses to be taxed, provided a general cover-all statute which, by its language, appears to be all inclusive.

I am, therefore, of the opinion that corporations organized for the playing of professional baseball and football and who follow and perform the purposes of their organization are subject to license taxes under one or more of the above mentioned statutes. I am, therefore, of the opinion that the above question should be answered in the affirmative. I am of

the opinion that they should be taxed under the provisions of Section 205.49 as a corporation engaged in the operation of a business. This opinion is limited to the above question and should not be extended by construction to nonprofessional football and baseball teams operated by schools and colleges.

October 1, 1946.—046-423.

TRANSMITTING FUNDS—LICENSE PAYMENT

QUESTIONS: 1. Where persons, firms and corporations, doing business in this state, receive funds from others for the purpose of transmitting the same, or a credit equal thereto, to foreign countries, are there any statutes of this State affecting or regulating the conduct of such a business in this state?

2. What occupational license taxes are required of such persons, firms and corporations conducting such a business in this state?

To Honorable J. M. Lee, State Comptroller:

It appears to be an established custom among banks and financial institutions in this country to transmit money and credits to other places and countries (9 C. J. S. 367, Section 172) and the power of banks to transmit such money or credit is well recognized in this country (9 C. J. S. 367, Section 172; 7 Am. Jur. 151, Section 198). The fact that a person, firm or corporation may exercise certain powers which are exercised by banks does not necessarily make them banking institutions (9 C. J. S. 30, Section 1). There seems to be two methods of transmitting money and credits in general use, (1) where the actual money or a sum equal thereto is transmitted and (2) where the transfer is accomplished by means of checks, drafts, money orders or cable, wireless or telegraph, miscellaneous orders (9 C. J. S. 367, Section 172). The practice of transmitting credits by means of drafts, checks and orders, grew up among **merchants** and bankers with the expansion of trade and the necessities of commerce (*Legniti vs. Mechanics and Metal National Bank*, 230 N. Y. 415, 130 N. E. 597, 16 A. L. R. 185).

It is now common practice for credits and money to be transmitted by postal money orders, telegraph money orders, express money orders and other methods and means by or through banks. It, therefore, appears that the banking and trust laws of this state have no application in this matter. There is no other statute of this State regulating the conduct of transmitting money and credits as aforesaid.

Any persons, firms or corporations having an established place of business in this state, for the purpose of transmitting money and credits, would be doing business in this state and, if a foreign corporation, should qualify as such with the secretary of state unless heretofore qualified, such persons, firms or corporations should also obtain an occupational license from the tax collector of the county wherein such place or places of business may be established.

I am of the opinion that the business of transmitting money and credits is not specifically covered by any particular section of our license tax law, therefore, it would be classed as a miscellaneous business regulated under Section 205.45, Florida Statutes, 1941. I think that neither Section 205.53, relating to persons engaged in the performance of public service, nor Section 205.58, relating to trading in intangible personal property has any application to the business in question.

June 4, 1945.—045-132.

ORANGE COUNTY—CERTAIN PERSONS; RELEASE FROM PAYMENT

QUESTION: Is House Bill No. 444 of the 1945 General Session of the Florida Legislature a valid and constitutional law?

To Honorable Millard F. Caldwell, Governor:

The bill was introduced into the legislature, on Tuesday, May 1, 1945, by a representative of Orange county. The house journal of that date recites "proof of publication of notice attached to the above bill" and that it was "ordered placed on the Calendar of Local Bills." The bill is made applicable to all counties in the state "having a population of not less than 70,000 or more than 70,500 according to the federal census of 1940" within which population group only Orange County qualifies with a population of 70,074 according to the federal census of 1940.

The act applying to only one county, and having been tied to the 1940 census so that it can never apply to any other county, is a local act. *Whitney v. Hillsborough County*, 99 Fla. 628, 127 So. 486, text 489; *Fort v. Dekle*, 138 Fla. 871, 190 So. 542; *State v. York*, 139 Fla. 300, 190 So. 599, text 601; *State v. Juvenal*, 119 Fla. 86, 121 Fla. 69, 163 So. 569, text 571.

The proof of publication attached to the bill reveals that the notice was published for the first time on April 17, 1945, and on April 24 and May 1 and 8, 1945. The bill was introduced on May 1, 1945, less than thirty days after the first publication. This was in violation of Section 21, Article III, of the state constitution, which requires that such notice be published "at least thirty days prior to introduction into the legislature." The bill appears to be invalid for this reason.

The effect of the law would be to release certain persons in Orange county from the payment of a state license tax that is required of persons in all other counties of the state. It discriminates against different sections of the state, as to the license taxes in question. The taxing law would not be general in its application over the state, with Orange county exempted by House Bill 444. The license tax would not be uniform over the state and the people of the State with Orange county excluded. The bill would cause the license laws to discriminate between members of a class, by exempting those persons in Orange county and not exempting those of the same class in other counties. The act, for these reasons, seems to violate the Fourteenth Amendment to the United States Constitution and the first Declaration of Rights of the State Constitution. 37 C. J. 197 and 198, section 51; 33 Am. Jur. 353 and 356, sections 30 and 32; *Amos v. Mathews*, 99 Fla. 1, 65, 115, 126 So. 308, text 326. The legislature has no power to impose an excise tax upon any group of counties less than all to defray general state expense. *Amos v. Mathews*, supra. A part of the license tax in question is a state tax. In the light of these authorities the act would, upon becoming a law, amend the general license laws in such a manner as to make them violate the state and federal constitutions.

Sections 20 and 21, Article III, of the state constitution, prohibit local laws "for assessment and collection of taxes for state and county purposes" and require that general laws upon that subject be of uniform operation throughout the state. If these sections are applicable to license tax laws, then the act would also violate them. As the act seems to violate other provisions of the constitution, this point is not decided but merely mentioned.

May 3, 1945.—045-107.

EXEMPTION—LEGION AMUSEMENTS

QUESTION: Is the following bill constitutional: A bill to be entitled an act to provide that various amusements operated under the sponsorship of the American Legion and similar organizations shall pay license taxes; etc.?

To Honorable Alex MacWilliams, Chairman, Committee on Military and Finance Affairs, House of Representatives:

The license taxes referred to are both state and county license taxes. The act, in my opinion, is unconstitutional and violative of Section 5, Article IX, of the constitution of the State of Florida, which provides that the legislature shall authorize the several counties and incorporated cities or towns in the state to assess county taxes for county and municipal purposes **and for no other purposes . . .** in that the act authorizes the several counties in the state to assess license taxes against the shows, etc., described in the act for purposes other than county purposes; that is to say, for the benefit of a private organization.

The act is also violative of Section 7, Article IX, which provides that no tax shall be levied for the benefit of any chartered company of the state, in that the license taxes mentioned in the act are levied against the shows, etc., enumerated in the act for the benefit of the chartered companies or associations named in the act.

The act also violates Section 10, Article IX, which provides that the legislature shall not authorize any county . . . to obtain or appropriate money for . . . any corporation, association, institution or individual, in that the act purports to authorize the county, through its tax collector, to appropriate an amount equal to the amount collected as state and county license taxes from the shows, etc., mentioned in the act for the benefit of the corporations, associations or institutions named in the act.

May 1, 1945.—045-102.

FRATERNAL BENEFIT INSURANCE—EXEMPTION

QUESTION: Does the proposed law designated as House Bill No. 406, 1945 Session of the legislature, which, as presently drafted, requires all persons, associations, societies, corporations or companies engaged in the business of insurance to pay certain license and premium receipts taxes, by including therein Fraternal Benefit Societies doing business under Chapter 637, Florida Statutes, 1941, also include the organizations or societies exempted from the provisions of said Chapter 637 by Section 637.59?

To Honorable J. Edwin Larson, Insurance Commissioner:

The broad coverage of House Bill No. 406 in its reference to insurers contemplated is of such possible expanse that I do not feel that as attorney general I should undertake to say what the legislature would intend, should it pass the bill as now worded.

The general and undefined classes included in the exemptions of Section 637.59 are so flexible and indeterminable that I would not want to interpret the coverage included, except where a specific insurer claimed to be exempted thereunder is involved.

House Bill No. 406 contains a repeal clause which in express terms repeals all other laws and parts of laws in conflict with it, and would be subject to enforcement and full recognition accordingly.

January 26, 1945.—045-19.

OIL WELL CEMENTING COMPANY—CLASSIFICATION

QUESTION: What is the occupational license classification of an Oil Well Cementing Company of Duncan, Oklahoma?

To Honorable J. M. Lee, State Comptroller:

I have perused the file submitted in connection with the above inquiry and have arrived at the conclusion that the same comes within the language of Section 205.35, Florida Statutes, 1941, which reads as follows:

"205.35 Contracting.—Every person engaged in the business of contracting in any of its branches shall pay a license tax of three dollars, plus one dollar for each person employed thereat, provided said license shall not exceed two hundred fifty dollars. A person who does all the work himself with no employees, helpers, or partners shall not be required to obtain a license under this section."

From the description of the business of the Oil Well Cementing Company, it is my opinion that it is not a service company alone, but on the contrary a company that sends into the state its apparatus and its employees who make the apparatus function as intended, which is to create and put in place cement casings, testing formations and making electrical logs of formations encountered in drilling such wells.

It does not come within the language of Section 205.36 because it is not confined to the public works described, nor, on the other hand, does it resemble "You Drive It" because the owner of the apparatus manipulates it through its own agents, nor do I believe that it lacks classification so that recourse should be had under the section provided for use in that contingency; hence my opinion that the classification should be under Section 205.35, the language of which is sufficiently broad to cover the activity described.

January 26, 1945.—045-17.

OCCUPATIONAL LICENSES—SALESMEN OF AN INDIANA COMPANY

QUESTION: Are the salesmen of products of an Indiana ladies' ready-to-wear company liable for the payment of the occupational license tax, prescribed by Section 205.59, Florida Statutes, 1941?

To Honorable J. M. Lee, State Comptroller:

I have caused an examination to be made of the file containing a certain brief sent to "A" by "B" and also a memorandum from "C." As a result thereof, I have come to the conclusion, and it is my opinion, that the salesmen described are liable for the tax. This is for the following reasons:

The law of Florida, as the brief indicates, was last dealt with in the case of *Dorsett v. Overstreet* (Florida 1944), 18 So. 2d. 759. Mr. "B" states that they do not think that this case, under the circumstances, has any bearing or effect, under the applicable statute, to our present inquiry. I regret that I cannot agree with this suggestion, as the case seems to be one which applies to a state of affairs legally identical with what appears in Mr. "B's" statement of facts. The cited case was not one against which the charge of too scant consideration could be made. On the contrary, the record of the case appears to indicate conclusively that it received mature consideration and finally a reversal on rehearing.

The opinion on rehearing, while that of a divided court, nevertheless appears to be the latest and only authoritative opinion of the court, and in addition it may be said that it appears to be based upon ample and sufficient authority. In short, it is the law of Florida at the present time, and as such, I feel that it is my duty to give it due consideration and to apply it to the matter here considered.

But there is another reflection that moves me to hold that the tax should be paid, that is the very confusion and doubt that have arisen in the consideration of the *Dorsett* case, which creates a state of affairs where, the constitutionality of the act being in doubt, its validity should be sustained.

It may be stated in addition that the tax imposed does not appear to have any resultant effect that could be construed to be either direct, substantial or discriminatory. On the other hand, it may be said that if this tax were not imposed upon the salesmen in question they would have an unfair advantage over salesmen selling for local dealers within the state.

TAX ON MOTOR FUELS OTHER THAN GASOLINE

October 30, 1946.—046-471.

DIESEL FUEL—LIABLE FOR TAXATION

QUESTION: Are substitutes for gasoline, such as diesel fuel and similar fuels, subject to taxation, under Chapter 209, Florida Statutes, 1941, when used in vehicles and machines, such as trucks, road rollers, road scrapers and similar road machinery, engaged in the construction or repair of public highways and roads within this state?

To Honorable C. M. Gay, State Comptroller:

Under Chapter 209, Florida Statutes, 1941, any motor fuel, used as a substitute for gasoline to generate power to propel motor vehicles over the public highways of this state, is subject to an excise tax of seven cents per gallon. "The tax is clearly intended as compensation for the use of the public roads of the state" (*Acme Freight Lines v. Lee*, 143 Fla. 635, 197 So. 499, text 500), and is "imposed on the use of such fuel . . . only when . . . used . . . to propel motor vehicles . . . on the public highways of Florida" (Section 209.02, Florida Statutes, 1941) "generally open for the use of the public as a matter of right for the purpose of vehicular travel," although temporarily closed for the purpose of construction or repair (Section 209.01, Florida Statutes, 1941). The statute in question appears to have been designed and enacted to place a tax on fuels used as a substitute for gasoline (*Tamiami Trail Tours v. Lee*, 142 Fla. 68, 194 So. 305).

In order for motor vehicles fuels, other than gasoline, to be subject to taxation they (1) must be used in a **motor vehicle** (which includes all vehicles, engines, machines or mechanical contrivances which are propelled by internal combustion engines or motors) operated upon or over (2) a **public highway of this state** (which consists of any way or place generally open to the use of the public as a matter of right for the purpose of vehicular travel, although temporarily closed for construction or repair) and (3) must be using the public highway so as to require that the State be compensated for the use of its highway. (See Sections 209.01 and 209.02, Florida Statutes, 1941, and *Acme Freight Lines v. Lee*, supra).

In the construction and repair of highways trucks, tractors, road rollers, road graders, and many other self-propelled machines are used; these machines appear to be within the above definition of motor vehicles. Any highway "generally open to the use of the public as a matter of right for the purpose of vehicular travel," although temporarily closed for the purpose of construction or repair, is within the statute, although highways under construction which have never been opened to the use of the public for general vehicular travel do not appear to be within the statute. As the purpose of the statute was to require compensation for the use of public highways in this state, it would seem that where there is no use of the highway there would be no taxes due. The word **use** has many meanings, however, in this connection it seems to mean the employment of a highway for accomplishing a purpose; to put a highway to use, to employ it; to make use of a highway; to avail one's self of a highway; to put to a purpose. (See "Use" in 43 Words and Phrases).

In the light of these observations, it does not appear that road construction and repair machinery, when operated in the construction or repair of highways in this state, are using such highways, within the purview of the statute, unless they also operate over some part or parts of the highways of this state open to the general use of the public, so that they may be said to be using up some part of the highway instead of constructing or repairing it. For example, road graders, road rollers, tractors, and similar machines used for the construction or repair of highways only, but which are not driven over completed parts of the highway under construction or repair, or over other highways, generally open to the use of the public for the purpose of vehicular travel, would not seem to be subject to the excise tax in question; on the other hand, trucks, and similar vehicles, supplying material for the construction or repair of highways or removing soil from the right of way in connection with construction or repair, which are operated over completed parts of the highway under construction or repair, or over other highways, which are generally open to the use of the public as a matter of right for the purpose of vehicular travel, would seem to be subject to the payment of the tax. The question whether or not any particular vehicle is within the statute is one of fact which must be determined in each particular case; if it is using a highway, or a part thereof, generally open to the use of the public as a matter of right, it is subject to the tax, although also engaged in highway construction or repair.

In the light of the statute under consideration, as construed in the *Acme Freight Lines* case, the question must be answered conditionally. If the vehicle in question is operated over a highway, whether a part of the one under construction or repair or some other highway, which is "generally open to the use of the public as a matter of right for the purpose of vehicular travel," it is subject to the tax, although the highway in question may be temporarily closed. If the vehicle in question is operated entirely for highway construction or repair, and is not also operated over a highway, whether a part of the one under construction or not, generally open to the use of the public, it is not subject to the tax. In order for a tax to be due there must be a using of a highway so that the tax is due as compensation for the use of the highway system of the state. The use of a highway contemplates some wear and tear, however slight, of the part used and not a building up of the same. The same vehicle may be engaged in both a use of one part of a highway and the construction or repair of another part, so as to require it to pay a tax on the motor fuel used by it.

FINANCIAL MATTERS, GENERALLY

February 18, 1946.—046-60.

INCIDENTAL FUNDS—LOSS OF IDENTITY

QUESTION: Will the so-called auxiliary fund of the institutions of higher learning when deposited in the state treasury as required by Chapter 22833, the Five Fund Act, lose their identity or revert to general revenue at the end of the biennium?

To Honorable Terry C. Lee, Budget Director:

I have held in a recent opinion that the Five Fund Act requires deposit in the state treasury of certain of the funds referred to in your question. All of these funds are ear marked for use and expenditure as the Board of Control may direct. When deposited in the state treasury they are classified and carried in the comptroller's office in General Revenue B, in which fund the comptroller carries ear marked funds and certain other funds not available for miscellaneous general expenses of the state. Many federal and other funds, including the incidental fund of the colleges are now, and have been, thus handled. These funds at

no time lose their identity, nor do they revert to any other fund at any time or become available for other state purposes unless appropriated therefrom or transferred by a legislative act. Some of them, such as federal funds or other donations granted or given for a specific purpose cannot be appropriated or transferred for other uses even by a legislative act. The effect on the auxiliary funds, when deposited in the state treasury, will be exactly the same in all respects as the deposits in the incidental fund of these institutions which have been thus handled for many years.

The answer to your question is that these funds do not lose their identity or revert or become available for other state purposes at the end of the biennium unless the next or a subsequent legislature should appropriate or transfer such funds for other state purposes.

January 28, 1946.—046-28.

SHIP CANAL FUNDS—DEPOSIT IN STATE TREASURY

QUESTION: Does the Five Fund Act, Chapter 22833, require deposit in the state treasury of funds received by the Ship Canal Authority exclusively from the Florida Ship Canal Navigation District?

To Honorable Terry C. Lee, Budget Director:

Section 2 of Chapter 22833 reads, in part, as follows:

"From and after the effective date of this Act all revenue including licenses, fees, imposts, or exactions collected or received under the authority of the laws of the State of Florida by each and every state official, office, employee, bureau, division, board, commission, institution, agency or undertaking of the State of Florida shall be promptly deposited in the State Treasury . . ."

The question involves two things, (1), whether the Ship Canal Authority is a state agency within the meaning of Chapter 22833, and (2), if so, are the funds received from the Navigation District created by Chapter 17023, Acts of 1935, revenue within the meaning of the Five Fund Act. I think the Ship Canal Authority is a state agency within the meaning of the Act, but after considering Chapter 16176 which created the Ship Canal Authority of the State of Florida, and Chapter 17023, Acts of 1935, which established the Florida Ship Canal Navigation district, the nature, origin, purpose and implied restrictions on the use of funds supplied to the authority by the navigation district, it is my opinion that the Five Fund Act does not require the deposit of such funds in the state treasury. This ruling is restricted to such funds. Funds received from other sources might require a different answer.

September 19, 1946.—046-395.

REFUND—LAND SOLD IN ERROR

QUESTION: Where the State Board of Education has sold certain lots may it refund to the purchaser the amount of the purchase price upon discovery that the state board has never had title to such lots?

To Honorable Nathan Mayo, Commissioner of Agriculture:

It appears that by the original survey of a section 16, bordering on a lake, made in 1850, the section contained only 424.04 acres. The state being entitled to 640 acres, the deficiency was made up in 1862 by a grant to the state of the difference, 215.96 acres, of lands elsewhere. In 1930, on a resurvey, it was found that certain land in the section and on the lake was erroneously omitted from the original survey and not shown on the original plat and this additional land was divided into five lots.

Thereupon, the state overlooking the fact that it had received indemnity lands for the full deficiency in acreage, entered these lots on its books as school land and subsequently sold all except one of them. The error has now been discovered and it is desired to refund the purchase price to the purchasers.

Section 215.26, Statutes of 1941, Cum. Supp. (Section 1, Chapter 22088, Laws of 1943) authorizes the comptroller to make certain refunds, among others, "any payment made into the state treasury in error." Claim for refund must be made within one year after the right to refund shall have accrued. The section also appropriates the money necessary for such refunds.

It is my opinion that this section is broad enough in its intent and purpose to authorize a refund of the purchase price paid for lands sold by the State Board of Education upon discovery of failure of title in the state board in such a case as this. It is also my opinion that the one year limitation would begin upon a determination of the fact that the state board never had title to the lands. I suggest that a resolution be prepared for adoption by the State Board of Education briefly reciting the above facts, determining that the state board has never had title, and authorizing and directing the refund of the purchase price to the purchasers. Notice may then be sent to the purchasers. The comptroller has a form for applications for such refunds.

November 7, 1945.—045-353.

FIVE FUNDS ACT—AGENCIES THEREUNDER

QUESTION: What state agencies come within the provisions of Section 2 of Chapter 22833, Acts of 1945, known as the Five Fund Act?

To Honorable Millard F. Caldwell, Governor:

The agencies come under four headings:

1. Agencies operating under appropriations or fees, or both;
2. Agencies which have heretofore not deposited in the state treasury, having fees as their sole revenue;
3. Agencies or institutions under the state board of control;
4. Institutions under the Board of Commissioners of State Institutions.

As you will note, there are sixteen agencies listed that have not heretofore deposited their funds in the state treasury. In every instance with respect to these sixteen, except the State Board of Chiropractic Examiners, the statutes contain specific authority for disbursement of fees collected by these agencies. In my opinion that is sufficient appropriation for that purpose within the meaning of the constitution, and permits the use of such agencies with the one exception, of their receipts and funds for their prescribed statutory operation and other disbursement requirements.

The chapter covering the State Board of Chiropractic Examiners makes no provision for expenditure of this board's fund. Section 3, paragraph (b) of the Five Fund Act clearly indicates an intention by the legislature that fees collected for the operation of the regulatory boards shall be used for such purpose and I am so holding and declare it to be my opinion that the funds of this Board of Chiropractic Examiners may be by such board drawn upon for its operating expenses through the regular channel in the regular way and subject to auditing by the comptroller. Otherwise we will have to make some provision for providing these operating funds from some other moneys. We could make such provision by resort

to Section 12 of the Appropriation Act and have the budget commission allot sufficient funds out of the half million dollars appropriated thereby for emergency use for its operating expenses, but in my opinion we are on solid ground in attempting and following the first course hereinabove outlined with respect to this Board of Chiropody Examiners in treating the provisions of Section 3, sub-section (b) of Chapter 22833 to contain a sufficient appropriation out of its collections for its operation expenses.

Your attention is respectfully called to the following copies hereto attached:

Institutions under State Board of Control

1. Florida State College for Women auxiliary funds
2. University of Florida auxiliary, agency and trust funds
3. University incidental funds
4. Statement concerning funds of auxiliary agencies and trusts at Florida A. and M. College
5. Florida School for the Deaf and Blind statement

Institutions under the Board of Commissioners of State Institutions

1. Florida Farm Colony
2. Florida Industrial School for Girls
3. Florida Industrial School for Boys
4. Florida State Hospital
5. Florida State Prison

The foregoing statements of the funds at the several institutions under the State Board of Control and the Board of Commissioners of State Institutions seem to me to be complete and comprehensive.

I consider that the following funds at the several institutions named do not come within the purview of the act:

At the Florida State College, the Soda Shop;

At the University, (a) The Cash Deposit Fund (Students' Bank), (b) Students' Activity Fund, (c) Sloan Foundation, (d) Murphree Memorial, (e) Pharmacy Professional Relations, and (f) Louis D. Beaumont Fund;

At the A. and M. College, (a) the Athletic Association Fund, and (b) the Entertainment and Lyceum Fund;

At the Florida Farm Colony, (a) the Patients' Fund, and (b) the Canteen Fund;

At the Florida Industrial School for Boys, (a) the Boys' Bank, and (b) the Boys' Store;

At the Florida State Hospital, (a) the Patients' Deposit Fund, (b) the Hospital Drink Stand, (c) the Student Nurses' Fund, and (d) the White Female Department Recreation Fund;

At the Florida State Prison, (a) the Canteen Fund, and (b) the Chapel Fund.

With the foregoing exceptions I have held that such and every of these various funds are to be regarded as "revenue * * * received under the authority of the laws of the State of Florida" by an institution or agency or undertaking of the State of Florida to be deposited with the

state treasurer in one of the Five Fund accounts, and I presume, of course, that a revolving fund will have to be created and established for each of these accounts in order that necessary and regular operating expenses may be paid therefrom by those in charge of operating administration of the respective units. I have held the law to permit the doing of such and that in such instances the revolving fund is the ultimate beneficiary but disbursements from it are to be audited by the comptroller and approved before replacements to cover such disbursements have been made to the particular revolving fund. For the better information of yourself and the budget board in this case, I attach hereto a copy of two opinions rendered by me upon request, number one to the Agricultural Experiment Station entitled, "In re: Revolving Funds" released June 29, 1945; number two, an opinion addressed to Honorable J. M. Lee, State Comptroller, entitled, "In re: Statutory Revolving Funds and the Operation of Section 13, Chapter 22827, Acts of 1945." Both of these opinions relate specifically to Section 13 of Chapter 22827, and its interpretation in the light of other related provisions of law; number three, to Honorable J. M. Lee, state comptroller, entitled, "In re: Revolving Funds Established without Express Statutory Authority and Section 13, Chapter 22827, Acts of 1945," and which, as its title indicates, relates to non-statutory revolving funds. The attached statements of accounts from the several institutions under the control of the State Board of Control seem to me to be complete and comprehensive.

I see no difficulties presented in the four state institutions of learning, or at the several institutions under the Board of Commissioners of State Institutions, being required to conform with the Five Fund Act provided sufficient pains, care, attention and proper auditing is given to the establishment of and administration thereunder from proper revolving funds. After the new system for the establishment and expenditure, auditing and refunding of such revolving funds is perfected, its subsequent continuance, follow up and operation seems to me not to involve any insuperable or objectionable obstacles or grounds for complaint.

It is respectfully recommended that the director of the budget be instructed to advise each agency of the requirements for depositing with the state treasurer by it of all moneys which it receives and that such advice be sent to those agencies listed and enclosed herewith. We submit a suggested form of letter to be used in this connection for all agencies except the institutions under the Board of Control and those under the Board of Commissioners of State Institutions. The letter to these institutions should except the funds mentioned on pages 3 and 4 of this letter.

February 28, 1945.—045-56.

PAYMENT OF SALARY DURING SUSPENSION

QUESTION: Where the governor suspends an officeholder from office and recommends his removal, but the senate refuses to concur in that suspension and removal and the legislature, by its act provides for the payment of such official's compensation during such period of suspension, is the payment of such compensation in order?

To Honorable Millard F. Caldwell, Governor:

The act in question was enacted to compensate the suspended official for salary during the period of suspension and removal from office. See Chapter 22187, Laws of Florida, Acts of 1943.

From the recitation in the preamble of this act, as you will see by reference to it, the official in question was suspended and removed by the governor but the senate refused to concur in the suspension and removal.

It further appears that if he had not been suspended, he would have received the sum of \$1,125.00 as salary, which under the constitution he would have lost except for the passage of the act in question.

The act not only finds that the money is due, but provides that it is thereby allowed as a claim against the state and this is accompanied by an appropriation out of the General Revenue Fund, and the comptroller and the treasurer are required to pay it.

In the circumstances, it is my opinion that the matter should be handled by referring the person entitled to payment under the act to the comptroller for the purpose of having the necessary warrant drawn and when it is drawn it will be your duty to countersign it so that said person may procure his money from the state treasurer upon presentation of the warrant.

STATE BUDGET COMMISSION

October 3, 1945.—045-310.

SALARIES AND EXPENSE ACCOUNTS OF ADMINISTRATIVE BOARDS

QUESTIONS: 1. Is the State Budget Commission limited by the provisions of Section 477.20, Florida Statutes, 1941, in its approval of those items of the budget of the State Board of Beauty Culture relating to the salaries of the members, other officers, and employees of said board?

2. Is the State Budget Commission limited by the provisions of said Section 477.20 in its approval of these items of the budget of said board relating to the expense accounts of such members, officers and employees, for traveling on official business?

To the State Budget Commission:

To Honorable Bryan Willis, State Auditor:

Your first question, as stated above, in so far as it relates to those salaries which are fixed by law, to wit, the salaries of the members, executive secretary and the inspectors for the board, has heretofore been answered in the affirmative by my opinion rendered to you under date of August 2, 1945. (Opinion No. 045-221). However, as to the salaries of employees of the board not fixed by law, the board is expressly granted the authority to fix such salaries by the provisions of Section 477.20, Florida Statutes, 1941 (formerly Section 14, Chapter 21984, Acts of 1943), which authority is subject to the budgetary approval of the State Budget Commission. See Sections 10 and 11 of Chapter 22857, Acts of 1945.

Your second question, however, is one not covered in said opinion. Said Section 477.20 also provides that each member of the board shall "be reimbursed for his or her traveling expenses in an amount not to exceed five cents per mile and four dollars and fifty cents per day actually incurred in the discharge of his or her duty, but the total expenses of any one board member shall not exceed the sum of one hundred and seventy-five dollars per month." Said section further provides that the board shall have authority to employ inspectors, and that each inspector "shall be reimbursed for his or her expenses in an amount not to exceed one hundred dollars in any month."

Chapter 22830, Laws of Florida, Acts of 1945, entitled, "An Act Fixing the Per Diem and Traveling Expenses of State Officers and Employees When Traveling on State Business," was enacted and became effective June 11, 1945. Said Chapter is all-inclusive, and Section 2 thereof expressly repeals all then-existing laws and parts of laws in conflict therewith.

It is therefore my opinion that the above quoted provisions of Section 477.20 are superseded by the provisions of said Chapter 22830, during the time said chapter remains effective, to wit: until and including June 30, 1947. During the period said Section 477.20 is so superseded, any member, officer, or employee of the board while engaged in the discharge of his or her official duties requiring travel, is entitled to (1) mileage allowance for use of a privately owned car, (2) the use of transportation requests for travel on common carriers, and (3) per diem allowance for subsistence, all as provided in Section 1 of said Chapter 22830. If the total monthly expenses thereof should conflict with any limitations upon monthly expense accounts set forth in said Section 477.20, such limitations are to that extent suspended, so long as Chapter 22830 remains effective.

For the above reasons it is my opinion that the State Budget Commission is not limited by the provisions of said Section 477.20 in its approval of those items of the budget of the State Board of Beauty Culture relating to traveling expense accounts for the members, other officers or the employees of such board, and that it is the duty of the State Budget Commission to approve so much of any requested allotment by the State Board of Beauty Culture as is necessary to provide sufficient funds to cover traveling expense allowances for the members, other officers or employees thereof, computed in accordance with the provisions of Chapter 22830, in so far as the board's total allotment does not exceed the total appropriation available to said board for the budget year in question.

I further hold that in all cases it is the duty of the spending agency to submit its budget for all of such expenses to the State Budget Commission, and that the spending agency is restricted to such totals as may be fixed by the budget commission.

June 29, 1946.—046-286.

JURISDICTION—LIMITING OF FUNDS

QUESTION: To what extent has the budget commission jurisdiction in limiting the expenditures of funds of the following boards: Board of Examiners of Basic Sciences, Board of Medical Examiners, and Board of Naturopathic Examiners?

To Honorable Terry C. Lee, Budget Director:

It is my opinion that these agencies like all other state agencies come within the provisions of Sections 216.16 and 216.17 of the statutes and that under those statutes the budget commission has the same authority as to the expenditure of funds of these agencies as it has over other state agencies, boards, departments, etc.

As to the Board of Examiners of Basic Sciences, Section 456.17 reads as follows:

"The expenses of the board shall be paid out of the fees received from applicants. After all expenses and ten per cent as a sinking fund to be used for future deficits are deducted, the remainder shall be divided equally among the members of the board."

Before the budget commission authorizes the compensation to the members it should require the reservation of the sinking fund mentioned in that statute and should require complete and satisfactory information showing that all expenses of the year have been paid or funds set aside for their payment. Such surplus as may then remain may be divided equally among the members of the board for their statutory compensation.

As to the Board of Medical Examiners and the Board of Naturopathic Examiners the same rule would apply except that Section 458.04 relating to the Board of Medical Examiners, and Section 462.09 relating to the Board of Naturopathic Examiners, do not require reservation of the ten per cent sinking fund before division of the remainder among the members as their compensation.

TAX ON GAS AND OIL PRODUCTION

February 28, 1946.—046-81.

INTEREST TAXABLE—RIGHT TO NOTICE

QUESTIONS: 1. Can an undivided interest in certain oil, gas and other minerals of every kind and nature in, on or under or that may be produced from certain lands in Florida be taxed for ad valorem taxes separate and apart from the surface interests?

2. Would registering your name, address and description of the land, in which you have such interest, entitle you to notice by the Clerk of nonpayment of taxes by surface owner, sale of tax certificates affecting the surface of the land, application for tax deed of the surface interest, and any other foreclosure proceeding against said land for unpaid taxes?

To Mr. Philip B. Berry, Tyler, Texas:

It is my opinion there can be no tax on your subsurface interest but only on the production of such oil, gas or minerals (see Section 14, subsection (a) of said Chapter 22784).

It is also my opinion that by conforming to subsection (d) of Section 14 of said Chapter 22784, you would be entitled to receive the notice from the Clerk as provided therein.

April 8, 1946.—046-133.

SUBSURFACE LEASES—FEE FOR RECORDING

QUESTION: To what fee is the clerk of the circuit court entitled for recording subsurface owner's interest in real estate under Section 14, Chapter 22784, Acts of 1945?

To Honorable J. M. Lee, State Comptroller:

It appears from the request for an opinion and the papers submitted that an oil company has approximately five hundred oil leases on property in Hillsborough county, and it intends to register with the clerk one declaration which will include its name, address, the description of the land in which it has subsurface interest as provided in Section 14, Chapter 22784, Laws of Florida, 1945.

The oil company contends that it can file one declaration which will include all the leases and the fee for same would be one dollar for the said declaration, plus the fee per page for recording now provided by law. It is the contention of the clerk that he should receive one dollar for each lease, plus the fee per page for recording now provided by law.

Section 14 of said Chapter 22784 says:

"It shall be the duty of the clerk of the circuit court to keep a record book . . . for the purpose of accepting for record any sub-surface owner's interest in real estate of said county and any owner of subsurface interests in the lands of said county may register with the clerk the name of such owner, his address, the description of the land, in which he has sub-surface interest . . . For his services in registering such sub-surface owners interest as herein provided, the clerk shall receive a fee of one (\$1.00) dollar, plus the fee per page for recording now provided by law."

The purpose of the said recording is to entitle such subsurface owner to notice of nonpayment of taxes by the surface owner.

In my opinion the law contemplates that the owner might file one declaration, including any number of leases, and that the charge would be one dollar for such declaration, plus the fee per page for recording now provided by law.

TAX ON CIGARETTES

August 27, 1945.—045-264.

CIGARETTE PERMITS—EXEMPTIONS

QUESTION: Is the director of the State Beverage Department authorized under Chapter 22645, Acts of 1945, to issue cigarette permits without charge to the persons entitled to the exemptions set forth in Sections 205.15 and 205.16, Florida Statutes, 1941?

To Honorable James T. Vocelle, Director, State Beverage Department:

That portion of Section 205.15 above, applicable here, provides that all confirmed cripples, deaf and dumb persons, invalids physically incapable of manual labor, widows with minor dependents, and persons sixty-five years of age or older, with not more than one employee or helper, and who use their own capital only, not in excess of five hundred dollars, shall be allowed to engage in any business or occupation in the counties in which they live without being required to pay for a license.

The pertinent part of Section 205.16, above, provides that any bona fide permanent resident elector of Florida who served as an officer or enlisted man in the United States Army, Navy or Marine Corps during the World War between April 6, 1917 and November 11, 1918, or in the Spanish-American War between April 21, 1896 and July 4, 1902, who was honorably discharged and who at the time of his application for license should be disabled from performing manual labor shall be granted a license to engage in any business or occupation in Florida which might be carried on mainly through the personal efforts of the licensee as a means of livelihood and for which the state license does not exceed fifty dollars, without the payment of any license tax otherwise provided for by law.

The second paragraph of Section 15 of Chapter 22645, above, reads as follows:

"At the time of making such application, the applicant shall pay to the Director a cigarette permit fee of \$5.00 if the application is for the sale of cigarettes at wholesale and a cigarette permit fee of \$3.00 if the application is for the sale of cigarettes at retail and no person, firm or corporation having a permit to sell cigarettes at wholesale shall be authorized thereunder to sell at retail, nor shall any person, firm or corporation having a permit to sell cigarettes at retail be permitted to sell at wholesale thereunder. **The permit fee as required under this Section shall be in addition to any license or other tax prescribed by law.**" (Emphasis supplied)

Section 205.13, Florida Statutes, 1941, provides that:

"Fees or licenses paid to any board, commission or officer for permits, registration, examination, inspection or other regulatory purposes shall be in addition to and not in lieu of any occupational license tax required by this chapter or other law unless otherwise expressly provided by law." (Emphasis supplied)

It will be noted that instead of expressly providing otherwise, Section 15 of Chapter 22645 states specifically that the cigarette permit fee is

in addition to any license or other tax prescribed by law. Moreover, as a consequence of paying the fee required by such Section 15, the applicant receives a mere permit to sell cigarettes, and such a fee is not an occupational license tax.

In view of the foregoing it is my opinion that the persons described in the aforesaid Section 205.15 and 205.16 are not exempt from paying the cigarette permit fee required by Chapter 22645, above, and that the director of the State Beverage Department is not empowered to issue a cigarette permit to any of such persons without charge.

October 29, 1946.—046-462.

EXEMPTION—GIFT—VETERAN HOSPITAL

QUESTION: Under Section 2 of Chapter 22645, Laws of Florida, 1945, is there any exemption from the payment of the tax of four cents per package on cigarettes purchased by a ladies' auxiliary to Veterans of Foreign Wars for gift to veterans in veterans' hospitals located in Florida?

To Honorable James T. Vocelle, Director, State Beverage Department:

Section 1 of the aforesaid chapter (Section 210.01, Florida Statutes, 1941) defines a "person" to include, among other things, an individual, society, club, association, and any combination of individuals, while Section 2 of such chapter (Section 210.02, Florida Statutes, 1941) requires that

"... every person who possesses or stores for sale within this State, or who sells or receives for the purpose of distribution or gifts to any other person within this State, cigarettes as herein defined shall pay to the State of Florida license or excise taxes hereby imposed ...",

thereafter specifying the various taxes, including the one for certain cigarettes upon which the tax is four cents per package.

The last-mentioned section further provides that the cigarette tax so imposed

"... upon such sales or distribution or gift of such cigarettes to another shall be collected only once upon the same package or container or such cigarettes after they have lost their interstate character."

and that

"Agents, located within or without the State, shall purchase stamps and affix such stamps in a manner prescribed to packages or containers of cigarettes to be sold, distributed or given away within the State, ..."

It is further noted that, under this same section of the aforesaid chapter, no tax shall be imposed upon cigarettes sold to post exchanges or ship service stores for resale to members of the armed services of the United States of America, if such post exchanges or ship service stores are operated under regulations of the United States Army or Navy in military or naval reservations within the State of Florida and that the tax shall not be required to be paid upon the cigarettes sold to ship stores or slop chests maintained on ships of the United States Merchant Marine for resale to members of the Merchant Marine.

The section under discussion also provides that

"It shall be presumed that all such cigarettes are subject to tax hereunder until the contrary is established . . ."

It is evident from the quotations given above that when the chapter was enacted the legislature had in mind the members of the armed services and that the legislature did not intend that cigarettes should be exempt from taxation under the conditions stated in your inquiry; hence, it is my opinion that your question must be answered in the negative.

CHAPTER XII

EDUCATION

SCHOOL CODE; SCOPE, ORGANIZATION AND DEFINITIONS

February 23, 1946.—046-78.

COUNTY AND DISTRICT FUNDS—LEGAL OWNER

QUESTION: Where the school officials of a county maintain several county and district school fund accounts, in one or more of the designated county depositories, who is the legal owner of such school fund accounts?

To Honorable J. M. Lee, State Comptroller:

The request for opinion seems to have been based upon the several county and district school fund accounts maintained in the designated county depositories in Jackson county, Florida, by the school officials of that county; however, any opinion as to these accounts will be applicable to the accounts in the other counties of the state. The question arises from certain correspondence between the comptroller's office and the Federal Deposit Insurance Corporation, as to whether the county board of education should be considered as the "depositor" of all school fund accounts in Jackson county, Florida, or should the county board and the several school districts be considered as the "depositors" as their interests may appear. The question directly involves the county general school fund, the county nursery school fund, the county school foundation fund, the interest and sinking fund accounts for several special tax school districts, several school district maintenance funds, one or more school district bond construction funds, one or more school lunch program funds and a so-called "refunding reserve fund."

The statutes (Section 227.14, Florida Statutes, 1941) provide for the following school funds: "county current school fund"; "county general school fund"; "district current school fund"; "school district interest and sinking fund"; "school district bond construction fund"; county school foundation fund (Section 242.05); county nursery school fund (Section 228.16); and maybe other funds.

The County Board of Public Instruction is a corporation (Section 230.21) and is the managing agency for the fiscal matters of the County School System. The county school funds must be used for county purposes. The trustees of the several special tax school districts are charged with the supervision of the schools in their districts and are required to examine the school budgets "in order to determine whether district funds are being used for the benefit of the schools of the district" and are required "to refuse to approve the budget unless the funds are to be used" for the benefit of the district. (§230.42). The trustees are also "responsible for the management, handling and proper expenditure of local school funds derived from school entertainments, school athletic contests, school cafeterias and similar local school sources when conducted as school projects." (Section 230.42).

The school district interest and sinking funds seem to be funds raised from tax levies authorized in the State Constitution (Section 17, Article XII) to pay interest and principal on special tax school district bonds. (Section 227.14 (17)). These special tax school districts are separate entities (*Hamrick v. Special Tax School District No. 1*, 130 Fla. 453, 178 So. 406) and funds of one such district may not be appropriated to

the obligations of another such district or to the obligations of the County (Board of Public Instruction v. Knight and Wall Company, 100 Fla. 1647, 132 So. 644), although such funds may be disbursed by the County School Board. Public officers hold the legal title to school district interest and sinking funds in trust for the bondholders and other creditors entitled to payment therefrom, and the same may not be used for any other purpose. (Federal Deposit Insurance Corporation v. Casady, CCA 10th, 106 Fed. 2d. 784; 44 C.J. 1233; City of Winter Haven v. Summerlin, 114 Fla. 727, 154 So. 863). School district interest and sinking funds belong to the school districts and not to the county.

In the light of the above and foregoing authorities (see also Sections 136.02, 227.14, 230.02, 236.13, 236.24, 236.30, 236.34, 236.35, 237.02, 237.03, 237.05, 237.12, 237.17, 237.19, 237.29, 237.30, 237.32, 653.12 and 653.13, Florida Statutes, 1941, and Sections 10, 13 and 17, Article XII, Florida Constitution), I am of the opinion that the "county general school fund," the "county current school fund," the "county school foundation fund" and the "county nursery school fund" belong to the county or the county board of public instruction; that the "district current school fund," the "school district bond construction fund," the "school district interest and sinking fund," the "school district maintenance fund," the "local school funds" derived from school cafeterias, etc., when managed by the district trustees, belong to the special school tax district or the trustees for such districts, no matter by whom deposited or by whom expended.

The county or its school board would doubtless be considered as one "depositor" and each special tax school district, or its trustees, as a separate "depositor" under the federal deposit insurance law, as to its funds deposited in a county depository protected by the Federal Deposit Insurance Corporation.

STATE AGENCIES

September 6, 1946.—046-382.

REVENUE CERTIFICATES—PURCHASE BY STATE BOARD OF EDUCATION

QUESTION: May the State Board of Education lawfully purchase with funds of the state school fund the Board of Control revenue certificates recently authorized by the latter board for new construction and improvements at the Florida State College for Women and the Florida Agricultural and Mechanical College for Negroes?

To Honorable Colin English, Secretary, State Board of Education:

Article XII, Section 3, of the constitution provides that the State Board of Education shall have the management and investment of all state school funds. Article XII, Section 5, requires that the principal of the state school fund shall remain sacred and inviolate. Section 229.08 (5) of the Statutes of 1941 requires the state board to properly administer the state school fund in compliance with Article XII, Section 3 of the Constitution.

There are no constitutional or statutory restrictions as to the securities in which the fund may be invested. If the board deems these certificates a safe and a good investment, it is my opinion that they may lawfully purchase them with funds of the state school fund. I may add that I have recently rendered an opinion holding that these revenue certificates and interest coupons, when issued in accordance with the resolutions adopted therefor by the Board of Control, will be valid and binding obligations payable from the funds provided therefor in the several resolutions.

October 11, 1946.—046-431.

SCHOOL TRUSTEE—REMOVAL—PROCEDURE

QUESTION: What procedure should be followed where a county superintendent or board of public instruction wishes to prefer charges against district trustees for their removal under Section 229.08 (15) of the statutes?

To Honorable Colin English, State Superintendent:

You state that a county superintendent wishes to charge two school district trustees with "misconduct in office" and "gross insubordination" and to ask for their removal by the State Board of Education. This may be originated by petition of the county superintendent or of a majority of the members of the board of public instruction or other persons having an interest in the matter, praying for the removal of the trustee (a separate petition as to each trustee) and setting up the cause or causes for his removal. It would be not sufficient merely to charge the trustee with gross insubordination or misconduct in office. That should be charged but the acts or omissions or facts constituting misconduct in office or gross insubordination should also be set out directly and specifically so that the trustee will know exactly with what he is charged. The statute is silent on the question but it is my opinion the petition should be verified by affidavit.

On receipt of a proper petition it would be your duty as state superintendent and secretary of the State Board of Education, to give the person against whom charges are preferred not less than ten days' notice of the charges and of the time and place of hearing before the State Board of Education. The state board should hear such testimony as may be offered by those preferring the charges and by the person against whom charges have been preferred. Form of notice might be as follows:

**NOTICE OF HEARING ON CHARGES
FOR REMOVAL OF SCHOOL
DISTRICT TRUSTEE.**

To:
(Street and number)
(City)
(State)

You are hereby notified:

1. That.....
(Superintendent of Public Instruction of
County or Board of Public Instruction of
County) has filed a petition with the State Board of Education
of Florida charging you as School District Trustee with miscon-
duct in office and also with gross insubordination, and praying
for your removal from office as such Trustee.

2. That in said petition you are charged as follows:

(Here insert the charges as set out in the petition).

3. That a hearing will be held on said petition and charges
by and before the State Board of Education of Florida at its
regular place of meeting in the Capitol Building at Tallahassee,
Florida, on the day of, 19.....
at o'clock in the (forenoon or afternoon).

You are further notified to be present at said hearing where
you will be given an opportunity to be heard in your own defense
in person or by counsel, showing cause, if any you have, why you
should not be removed from said office.

Witness the hand of the State Superintendent of Public In-
struction, and Secretary of the State Board of Education of
Florida at Tallahassee, Florida, this day of,
19.....

.....
Superintendent of Public Instruction, and Secre-
tary, State Board of Education of Florida.

The notice should be personally served on the trustees and affidavit of service made by the person making the service or it may be served by registered mail, with return receipt requested, and addressed to the usual place of abode of the trustee. If the board determines from the evidence submitted that the trustee is guilty of any of the charges preferred against him, he should be removed from office by order of the board and copy of such order delivered to the trustee.

June 25, 1946.—046-274.

SCHOOL LUNCH PROGRAM—PRIVATE SCHOOLS

QUESTIONS: 1. Has the State of Florida an educational agency possessing the legal authority to administer a state-wide school lunch program in accordance with the provisions of an act of Congress designated HR 3370?

2. If your answer to the above question is in the affirmative, can such agency legally disburse funds to non-profit private schools?

To Honorable Millard F. Caldwell, Governor:

Accompanying your request for an opinion was a copy of the conference committee's report on H. R. 3370 containing a copy of the bill as amended by the committee and recommended for enactment. The amended bill as recommended by the committee by the committee was enacted, and on June 4th was approved, and became Public Law 396, 79th Congress.

The federal act makes appropriation for aid to the states in connection with the lunch program. The act provides for its administration by the secretary of agriculture, for apportionment of funds to the states, and disbursement in accordance with agreements entered into between the secretary of agriculture and the state educational agency. The funds are to be used for foods, and also equipment needed in connection with the handling of the food. In addition to the funds, the secretary is authorized to supply agricultural commodities in kind. The state educational agency as defined in the act is such agency as may be authorized by the legislature to administer the funds allotted to the state, or in the absence of designation by the legislature, such agency as may be named by the governor.

Section 229.08 (10), Florida Statutes, 1941, makes it the duty of the State Board of Education to provide for the proper administration of federal funds granted in aid of education. In Section 236.23, Florida Statutes, 1941, authority is given to the state board to accept the provisions of any federal act apportioning funds to the state for use in the state's educational system and the state board is required to prescribe the necessary regulations for the apportionment and disbursement of such funds; this latter section also provides that such funds shall be disbursed by the state treasurer on warrants drawn by the state comptroller upon requisition by the state superintendent and approval of the state board.

In addition to those statutes the 1945 legislature enacted Chapter 23136 (Section 242.51, cum. supp.). This latter act requires the State Board of Education to prescribe regulations under which contracts, agreements or arrangements may be made with the Federal Government for funds, services, commodities or equipment made available to public tax-supported schools which are under the supervision or control of the state board and further provides that such contracts, agreements and arrangements for public tax-supported schools shall be made only in accordance with regulations prescribed by the State board.

For several years certain agricultural commodities have been supplied by the Federal Government for relief purposes, and some of these commodities were distributed to the schools in this state in aid of the school lunch program. The distribution of such commodities to the schools and others was by the State Welfare Board which is authorized by Section 409.02 of the Statutes to receive and distribute commodities donated by the United States. However, Chapter 23136 referred to above definitely places in the State Board of Education the responsibility for distribution of federal donated agricultural commodities in so far as they may be supplied for the school lunch program under the National School Lunch Act.

For the foregoing reasons, and answering your first question, it is my opinion that the State Board of Education is the state educational agency designated by the legislature to administer the funds as well as the agricultural commodities allotted to the state under the National School Lunch Act, and that the state board has been given by legislative act authority to make such agreements, contracts, arrangements, rules and regulations as may be necessary to receive the benefits of the federal act and administer the same.

Answering your second question, it is to be noted that Section 10 of the National School Lunch Act provides that if, in any state, the state educational agency is not permitted by law to disburse the funds paid to it under the act to nonprofit private schools in the state, or is not permitted by law to match federal funds made available for use by such nonprofit private schools, a proportionate amount of the fund payable to the state shall be withheld by the secretary of agriculture and such portion thus withheld shall be disbursed by the secretary of agriculture directly to the nonprofit private schools within the state on the same terms, conditions and restrictions as accompany the funds apportioned to the state agency for tax-supported schools.

Other than in matters of school attendance, neither the state board nor any other state educational agency has authority or responsibility in regard to private schools. All authority granted to the state board under the statutes mentioned above is clearly restricted to public tax-supported schools. Furthermore, the laws of this state would not permit the State Board of Education or any other state educational agency "to match federal funds made available for use by such nonprofit private schools." It is my opinion that neither the State Board of Education nor any other state educational agency has any authority to disburse funds or commodities supplied under the National School Lunch Act for pupils of private schools. The foregoing answers your question, but I wish to add this further comment:

It has been my thought for a long time and I have heard it expressed by a great many people on a great many different occasions, that federal programs of money donations to the states, with few exceptions, carry with them some requirements on the part of the state to submit itself to federal control incident to the use by the state not only of the federal money but of state matched money. In other words, it is a federal dole with a penalty of new and additional state subservience to federal control. This National School Lunch Act seems to me to depart from prior accepted fields of federal purposes and federal control, and before you determine your course with respect to the acceptance of this federal lunch money and otherwise comply on the part of the state in order to participate in the benefits of the act I shall be glad to submit a legal opinion or brief on the constitutionality of the federal act if you care to consider the question. It seems to me that we in Florida are quite able to carry on our own school lunch program without federal aid and that this federal act may give us the opportunity to take a helpful step toward standing up for state independence in the field of state government and asserting an opposition to federal meddling even though it be by way of a money dole.

So far as we in the South are concerned with federal intermeddling with state affairs, the difference in this federal act appears to relate to the race question primarily, and in this connection I call your attention to the provisions of subsection C of Section 11 of the Act which reads in part:

"If a State maintains separate schools for minority and for majority races, no funds made available pursuant to this Act shall be paid or disbursed to it unless a just and equitable distribution is made within the State, for the benefit of such minority races, of funds paid to it under this Act."

That presents the following query: Has the federal authority the right to employ legislation to form state administration and policy and if it has, who is going to determine what is just and equitable distribution,—the federal board or sources from which the money comes, or the state authority distributing the money?

A further question occurs to me: If they impose this majority and minority limitation or regulation on the distribution of money, what further provisions in this particular category are likely to be made as time goes on?

COUNTY SCHOOL SYSTEM

May 29, 1945.—045-127.

PRINCIPAL—APPOINTMENT BY COUNTY BOARD

QUESTION: May a county board of public instruction reappoint a principal of a district school on its own authority where the school trustees refused to nominate the former principal for reappointment and did not make nomination of another person for that position until April 18, which was twelve days less than eight weeks prior to the close of the school?

To Honorable Colin English, State Superintendent of Public Instruction:

Section 230.43 (1), Florida Statutes, 1941, requires the trustees to consider the superintendent's recommendation for principal and to make nominations to the county board; and such nominations shall be submitted to the board at least eight weeks before the close of the school.

Section 231.35 (2) provides for reappointments. This requires the trustees to file with the county board within the four weeks preceding the eight weeks before the close of the school definite recommendation for or against reappointment of any person subject to annual nomination for reappointment, and also requires the county board and the superintendent to notify such person whether or not he has been reappointed. It does not say when the notification shall be given, but, presumably, it would be within the four-week period. It also provides that if the trustees fail to act on any reappointment within the time prescribed by law, it shall be the duty of the county board to act on its own volition after considering nominations submitted by the county superintendent. This subsection was designed for the benefit of the teacher and its purpose was to let the teacher know promptly whether he is going to be re-employed and to give him time to seek employment elsewhere if not reappointed.

Section 230.23 (7) (c) requires the county board to act not later than six weeks before the close of the school year on nominations by the trustees for the position of principal. The board can reject nomination but only for good cause, and if the first nomination of the trustees is rejected, the trustees have the right to make a second nomination. No time limit is set for the second nomination. If the second nomination is rejected, the section authorizes the county board to proceed on its own motion to fill the position. It also provides that if the trustees do not make nomination within "the time limits hereinabove specified," the county board may make appointment on its own motion.

It appears from the above that the trustees are required to nominate for the position of principal not less than eight weeks before the close of the school. I think this is merely directory because, under the last section mentioned, the county board does not have to act on the first nomination until six weeks before the close of the school; then if said board rejects it, the trustees have the right to make a second nomination and, as no time limit is fixed for the second nomination, they would be entitled to a reasonable time within which to make the second nomination. Accordingly, it appears that the eight weeks provision and the other time requirements for nomination of teachers, etc., merely set up a routine designed to enable the county board to make contracts as early as possible before the end of the school year. Failure to nominate within eight weeks before the close of the school year does not eliminate the power and right of the trustees to make nominations. So long as the county board has not lawfully made a contract with another person on its own motion, it is the duty of the board to appoint nominees of the trustees in the absence of good cause for their nonappointment, at any time they may be nominated by the trustees.

If the trustees nominate at least eight weeks before the close of the school and the nomination is rejected for cause, they must be given a reasonable time after the rejection for a second nomination. If this second nomination should be rejected for cause, the county board may then proceed on its own motion to select a principle; but the trustees even then have the right to make a further nomination up to such time as the board actually contracts with another person.

If, on the other hand, no nominations are made by the trustees at least eight weeks before the close of the school, the county board has the right to immediately contract with another person; but, again, it is their duty to employ any nominee of the trustees except for cause, which nomination may be subsequently made up to such time as the county board may have actually contracted with another person.

It should be kept in mind that our supreme court has held that nomination by the trustees is implied employment and except for cause the county board has no option other than to employ such nominee. In *Board of Public Instruction vs. Connors*, 4 So. (2d) 382, the court said, "the contract of employment impliedly existed as a matter of law when the nomination as teacher was made and presented to the board."

In the situation presented by your questions, it is the duty of the board to employ the nominee of the trustees, in the absence of good cause unless the board had actually contracted with another person between April 6 (eight weeks before the close of the school), and the subsequent filing of the nomination by the trustees.

October 29, 1946.—046-455.

EMERGENCY EMPLOYMENT OF TEACHER—TRUSTEE APPROVED

QUESTION: May the county board of public instruction employ a teacher to fill an emergency vacancy upon the recommendation of the county superintendent before the latter had presented the teacher's qualifications to the trustees and obtained their approval?

To Honorable Colin English, State Superintendent of Public Instruction:

In answering your question I am assuming that the trustees had made no nomination. I presume that an emergency vacancy means a situation where there is an urgent and immediate need for a teacher and that there is insufficient time to follow the usual routine of nomination by the trustees as set up in the statutes.

On the one hand it is of the greatest importance that instructional staff be promptly provided for the school children, and it is the duty of the county board to see to it that teachers are supplied when needed; on the other hand the nomination of instructional staff is probably the most important duty and privilege of the trustees and their rights in that respect, as set up in the statutes (Section 230.43 (1) and (2)), should be observed so far as possible even in cases of emergency.

In case of such an emergency vacancy it is the duty of the county superintendent to immediately notify the trustees in order that they may have an opportunity to make nominations. It is also the duty of the county superintendent to promptly recommend to the trustees any qualified teacher he may have in mind for the vacancy and notify the trustees of the time and place when his recommendation will be submitted to the county board for action. The superintendent having thus complied with the statutes as fully as the emergency will permit, the board at the time and place designated may proceed to act on any nomination which may then be made by the trustees. If no nomination should be made by the trustees, the board may act on the recommendation of the county superintendent, if, in the opinion of the board, the emergency is such as will not permit further time for nomination by the trustees. Under the circumstances, this would be reasonably consistent with the general policy set up in Section 230.23 (7) (c) of the statutes.

May 30, 1945.—045-129.

TRUSTEES—AUTHORITY TO SUPPLEMENT PRINCIPAL'S SALARY

QUESTIONS: 1. Have the trustees authority to supplement the salary of the principal by allowing him free rental of a house which is school property?

2. Would it make any difference if the house was purchased with district funds and the title is in the trustees?

3. Is it the duty and responsibility of the board or of the trustees to fix the rental for such house?

4. Where a principal, at the direction of the trustees, declines to pay rental lawfully fixed for the use of such a house, may the accumulated rental be deducted from his salary?

To Honorable Colin English, State Superintendent of Public Instruction:

Section 230.23 (7) (f), Florida Statutes, 1941, requires the county board to fix and determine salaries to be paid members of the instructional staff.

Section 230.22 (4) makes the county board the contracting agent for the county school system.

Section 230.35 gives the board control of all school property.

All contracts on behalf of a special tax school district on district school property must be made by the county board. *B. P. I. vs. Knight & Wall Co.*, 132 So. 644.

It will be observed from the above that the county board determines what salary shall be paid to a principal or teacher. The trustees have no authority whatsoever in that respect. Even if the trustees had the right to rent a house which belonged to the school district, they could not increase the compensation of a principal or teacher by allowing him free rent. But the trustees have no right to rent or control such prop-

erty. All school property, including district school property, is under the control of the board and this is true regardless of the fact that the property may have been purchased with district school funds and the title vested in the trustees. This is in answer to your first and second questions.

The trustees can make no contract. Every contract relating to any part of any school property must be made by the board, and it is the duty of the board to fix rentals if any school property is to be rented. This answers your third question.

Accumulated rental owing by a principal for the use of school property as a residence may be offset against the salary due the principal. This should be done within such time as will surely result in payment of the rent, but, where possible, should be spread over such length of time as will not make too great a burden on the principal. This is in answer to your fourth question.

December 17, 1945.—045-391.

SCHOOL BOARD—FILLING VACANCIES CREATED BY LAW

QUESTIONS: 1. Where a county's population in the 1945 state census increased from less to more than 50,000 people, requiring the change from a three-member to a five-member board of public instruction under Section 230.04, Florida Statutes, 1941, should the additional two members be elected for two year or four-year terms?

2. Does the governor have the power to appoint the two new members as soon as the new districts are established, or can these positions be filled only at the next election?

To Honorable Colin English, State Superintendent of Public Instruction:

In the case under consideration I understand that the terms of the board members from Districts 1 and 3 expire in January, 1947, and the term of the board member from District 2 expires in January, 1949. Section 230.05 provides that the term of office of board members shall be "four years except as hereinafter provided." One of the exceptions referred to was the provision for overlapping terms of school board members. It was regarded of such importance as to make an exception to the four-year term provision when, at the time of the adoption of the school code, a change from a three-member to a five-member board was required. The same reasons exist when a board is increased from three to five members by reason of increase in population in a subsequent census. Under these circumstances it is my opinion that in the 1946 primary and election, board members for Districts 1, 3 and 5 should be nominated and elected for four-year terms and that the board member for District 4 should be nominated and elected for a two-year term, and in 1948 members from Districts 2 and 4 will be elected for four-year terms, thus conforming to the plan set up in Sections 230.08 (1) and 230.09 (1).

After the board shall have completed the redistricting into five districts there will be two vacancies in the five-member board. Section 230.19 provides that all vacancies on the county board shall be filled by appointment by the governor. It is my opinion that the statute covers vacancies created by the increase in the board membership.

January 28, 1946.—046-38.

MEMBER—UNEXPIRED TERM—DATE OF COMMISSION

QUESTIONS: 1. Where the governor refused to commission a member of the board of public instruction who was elected in 1942 for a term of four years beginning in January, 1943 and in June, 1943 appointed another person to that office, when does the appointee's term expire?

2. Where the appointee mentioned in the first question ran for reelection in 1944, took office in January, 1945, and was given a commission by the governor for a four-year term beginning January 1, 1945, does the commission entitle him to the office for four years from January, 1945, or will it be necessary for him to run in the primary and election of 1946 for a four-year term beginning January, 1947?

To Honorable Colin English, State Superintendent of Public Instruction:

The statement of facts accompanying your inquiry does not state whether the commission issued in June, 1943, was for the unexpired term or until the next general election, but it is unimportant because the law, and not the date fixed in the commission, is controlling. *State vs. Taylor*, 146 So. 549. In an advisory opinion to the governor, 19 So. 2d 198, our supreme court held that an appointment to fill a vacancy on a board of public instruction must be for the unexpired term. Under those decisions, the man appointed in June, 1943 holds the office under that appointment until January, 1947.

The appointee's election in 1944 for a term beginning in January, 1945 was a nullity and he acquired no right to office by reason of the results of that election. Accordingly, it will be necessary for him to run in the 1946 primary and election for a four-year term beginning January, 1947.

March 15, 1946.—046-102.

TRUSTEE AS INSURANCE SALESMAN

QUESTION: Is it lawful to place insurance on tax school district property through an insurance agent who is a trustee of the special tax school district?

To Honorable Colin English, State Superintendent of Public Instruction:

Section 230.23 (11) (d) requires the county board to insure all school property, title to which is in the board. Duty to insure the property is also imposed on the board by Section 235.07. Section 237.02 (4) permits the county board, within the budget limits, to authorize the trustees to make purchases from the school district funds. Section 230.43 (10) provides that when the title to the property was held by the trustees on July 1, 1939, the county board should delegate to the trustees certain responsibilities for maintenance, including the duty of keeping the property insured.

From the above it will be observed that we have two situations, (1) where the insurance is placed by the county board, and (2) where the insurance is placed by the trustees under the above statutes.

Where, under the statutes, the insurance is placed on the school property by the county board there appears to be nothing in the law, statutory or otherwise, which would make it improper or unlawful for the county board to place insurance through an insurance agent who is a district trustee. On the other hand, where the insurance is placed by the trustees under the authority of the above statutes, the insurance agent who is a member of the trustees, would be acting for both parties, which is contrary to public policy, and I think it would be unlawful even where he did not vote or participate in the placing of the insurance by the trustees.

For the reasons stated, it is my opinion that a district trustee who is an insurance agent may write insurance on school property of his district if, under the law as set out above, the insurance is placed or purchased by the county board, but that he may not do so if it is placed by the trustees.

November 26, 1946.—046-484.

TRUSTEE—EMPLOYMENT AS TEACHER

QUESTION: May a school district trustee be employed as a teacher in one of the schools of his district?

To Honorable Colin English, State Superintendent of Public Instruction:

In a Vermont case, *Scott vs. School District*, 31 Atl., 145, teachers were selected by a prudential committee, and a committeeman appointed himself teacher in the district school. Referring to the statute relating to the committee, the court said:

"Its language was 'shall appoint and agree with a teacher to instruct the school, and remove him when necessary.' This confined their authority to appointing and agreeing; and, as their official power in this regard was fiduciary, the case would seem to fall logically within the principle that it is against public policy to allow one standing in such a relation to contract with himself concerning the subject of his trust; and, when we consider that it was the duty of such committees to remove a teacher when necessary, the case all the more clearly falls within that principle, for it is fundamental that a man shall not be a judge in his own case, and that doctrine is not alone applicable to strictly judicial officers, but to everyone who acts in a judicial capacity, as a prudential committee did when he sat to determine whether it was necessary to remove a teacher or not. The law of this subject is so well settled and so familiar that we deem the citation of authority unnecessary. . . ."

In 56 C. J., 367, the rule is briefly stated:

"A school officer, such as a trustee, whose duties are incompatible with those of a teacher, cannot be both officer and teacher at the same time."

Under the Florida School Code, the employment of teachers is by contract executed by the county board of public instruction, but the teachers for district schools are nominated by the trustees, and the county board is required to appoint such nominees except for cause (See Section 230.23 (7) (c) (e) and (g) and *State vs. Colson*, 14 So. (2d) 793). This results in giving to the trustees the privilege and duty of selecting the district school teachers, after consideration of the recommendations of the principals and the county superintendent, and subject only to veto by the school board for cause. The legal principles involved in the present question are substantially the same as they would be if the trustees executed the formal contract of employment.

Among the duties of the trustees is that of filing charges against a member of the instructional staff and to recommend dismissal of instructional staff in proper cases. Section 230.43 (3). The duties of the trustee are fiduciary in character; the selection of teachers is a trust, requiring utmost good faith and disinterested action on the part of the trustee. It is too obvious to require argument that a person can not satisfactorily exercise that good faith or fulfill the trust when self-interest is involved, as it would be if a trustee were employed as a teacher in his district. There is a conflict of interest which public policy forbids.

For the reasons stated, it is my opinion that a school district trustee may not be employed as a school teacher in a school of his district.

March 19, 1946.—046-129.

SCHOOL BOARD—MEMBER AS TEACHER

QUESTION: May a county school board employ one of its members to teach where the board has been unable to secure a permanent teacher?

To Honorable Colin English, State Superintendent of Public Instruction:

The statutes require the county board to enter into a contract with instructional personnel. It is contrary to public policy for any public board to contract with any of its members and, therefore, unlawful. Accordingly your question is answered in the negative.

July 26, 1946.—046-319.

COUNTY BOARD MEMBERS—SALARY AND MILEAGE

QUESTION: Does Chapter 17744, Laws of 1937, now apply to Leon county?

To Mr. Amos P. Godby, County Superintendent of Public Instruction, Leon County, Tallahassee, Florida:

Chapter 17744 of the Laws of 1937 provides that in all counties of the state having a population of not less than 35,380 nor more than 36,000 according to the last preceding state census each member of the board of public instruction shall receive an annual salary of \$360.00, payable in monthly installments, together with 10c per mile for every mile actually traveled in the performance of their duties. According to the 1945 State census Leon County's population is 35,451 which brings the county within the provisions of Chapter 17744. The supreme court has uniformly held that statutes of this type are not reasonable classifications of counties and, therefore, are unconstitutional.

March 29, 1946.—046-117.

COUNTY BOARD—NEW DISTRICTS

QUESTION: Is it a mandatory duty of the governor to appoint two new members to the county board of public instruction in those counties which have recently grown into the 80,000 population bracket before any steps have been taken by the county board to redistrict in accordance with provisions of Section 230.04 of the statutes, or may the governor withhold any such appointment until the county board actually redistricts the county and applicants for the two new districts qualify and are elected?

To Honorable Millard F. Caldwell, Governor:

The statutes provide for the nomination and election of one member from each county board election district. The member must reside in his district. Appointments by the governor to fill a vacancy in the school board would be from the district in which there is a vacancy. Until the county board complies with the law in regard to redistricting the county, there are no new districts, and therefore, no vacancies to be filled.

It is my opinion that you have no duty to make an appointment until the county board shall have divided the county into five districts. When the county board shall have lawfully divided the county, it will then be your duty to immediately make an appointment from each of the two new districts.

July 3, 1945.—045-169.

COUNTY SUPERINTENDENT—AUTHORITY TO MAKE NOMINATIONS

QUESTIONS: 1. Does Chapter 19577, Acts of 1939, apply to all counties having a population of 180,000?

2. If so, does the county superintendent in such a county have the right and authority to nominate to the county board of public instruction all supervisors and other employees of district schools, except teachers, principals, janitors, and the school board attorney?

3. May such nomination by the county superintendent be rejected by the board without cause going to the qualifications of the nominee to hold the job?

4. What is the procedure for effecting a joint nomination of a member of the instructional staff by the county superintendent and the trustees?

To Honorable Edwin C. Coffee, Attorney for the Board of Public Instruction, Duval County, Jacksonville, Florida:

Chapter 19577, Acts of 1939, became a law on the same day as Chapter 19355, the school code. It was passed as a special or local act and at the time of its enactment applied only to Dade county. By its terms, as stated in my opinion of June 5, 1941, it was applicable to all counties of not less than 180,000 population, and after the census of 1940, it applied also to Duval and Hillsborough counties.

The provisions of Sections 2 and 3 of Chapter 19577 were radical departures from the school code in the matter of employment of certain school personnel. Those sections read as follows:

"Section 2. That all trustees of special tax school districts in each county affected by this act shall have authority to jointly nominate with the county superintendent of public instruction to the county board of public instruction, principals, teachers and janitors of their respective districts. The county superintendent of public instruction of such county shall have authority, without the concurrence of trustees, to nominate to the county board of public instruction all supervisors and other employees, excepting teachers, principals and janitors in the special tax school districts, and the school board attorney."

"Section 3. That the county board of public instruction shall have authority to appoint or reject all such nominations, but shall not have authority to appoint any principal, teacher, janitor or other employee, except the school board attorney, without nomination as provided in this act."

Two years later, numerous provisions of the school code were amended by Chapter 20970. Section 4 of that Chapter, which amended Section 535 of the School Code (Section 231.35, Florida Statutes, 1941) reads, in part, as follows:

"All employees of the county school system shall be appointed as prescribed in chapter 230; provided that the terms 'to consider the recommendations of' or 'to act upon the recommendations of' shall be interpreted to mean that neither the trustees nor the county board shall act on the appointment of employees without having considered any recommendations or nominations submitted as prescribed by law, that such recommendations or nominations may be rejected only for good cause, and that when any such rejection has been made, a second and if necessary a third recommendation or nomination shall be requested and if made within a reasonable time as prescribed by the county board, shall be considered or acted on as prescribed by law before the trustees or county board shall have a right to nominate or to appoint on their own motion; and, provided further, that the following procedure shall be observed in making appointments and reappointments of instructional personnel: . . ."

The amendment consisted in the addition of the proviso.

Chapter 20970 also contained a repealing clause, as follows: "Section 210 of Chapter 19355 . . . and all laws or parts of laws, general, special, or local, in conflict with the provisions of this act are hereby repealed."

Chapter IV of the school code, which appears as Chapter 230 of the Statutes, prescribes in Section 230.33 (7) (b), (c), and (d), certain duties of the county superintendent in the matter of employment of personnel. It also prescribes, in Section 230.43 (1) and (2), the duties of the trustee in regard to employment of personnel.

It will be observed that the first sentence of Section 2 of Chapter 19577, in that it requires the joint nomination of certain school personnel, is clearly in conflict with Section 4 of Chapter 20970 (Section 231.35 of the statutes), which latter section, in turn, refers to the authority for recommendations by the superintendent contained in Section 230.33 (7) (c) and (d), and nominations by the trustees in Section 230.43 (1) and (2). Accordingly, it is my opinion that if that part of said Section 2 ever was valid, it was repealed by Chapter 20970. The second sentence of Section 2 of Chapter 19577 is similar to Section 230.33 (7) (b), but very much broader. Both relate to employees other than principals, instructional staff, and janitors.

Section 231.35, as amended in 1941, is not clear but covers recommendations and nominations by the county superintendent and by the trustees, and contains the provision, "that such recommendations or nominations may be rejected only for good cause." That provision is undoubtedly valid as to nominations by the trustees; but I think, in order to maintain the constitutionality of the clause just quoted, in so far as it refers to the county superintendent, it must be construed to relate only to the recommendations of the county superintendent for appointment of the employees mentioned in Section 230.33 (7) (b), in district schools, the superintendent's nomination of those district employees mentioned in the second sentence of Section 2, Chapter 19577, and instructional staff and other employees of nondistrict schools, the latter as provided in Section 230.33 (7) (e).

Section 10 of Article XII of the constitution gives the trustees supervision of all district schools. So far as supervision is concerned, it is not clear to me that any distinction can be made between a district school "teacher" or "principal," on the one hand, and other district employees mentioned in the second sentence of Section 2, Chapter 19577, or employees mentioned in Section 230.33 (7) (b) who may be strictly district employees as distinguished from county-wide employees. Whether or not these two last mentioned statutes, which take from the trustees the power of selection of any strictly district employee, are unconstitutional, is not for me to say, but I direct your attention to *State vs. Golson*, 14 So. (2d) 793, and *Board of Public Instruction vs. State*, 3 So. (2d) 707, holding that the selection of teachers and principals in the district schools is within the "supervision" of the schools given to the trustees by the constitution.

So long as neither the second sentence of Section 2, Chapter 19577, nor Section 230.33 (7) (b), in so far as it may cover strictly district employees, has been held invalid by the court, it is my opinion that under Section 231.35, as amended, the recommendation by the superintendent of district personnel mentioned in Section 230.33 (7) (b) and the nomination by the superintendent of the district personnel mentioned in the second sentence of Section 2 of Chapter 19577 are binding upon the board and may be rejected only for cause. The same would apply to his nominations of nondistrict personnel as provided in Section 230.33 (7) (e). This is in answer to your second and third questions. Neither the superintendent nor the trustees have any authority whatever in the matter of employment of the school board attorney.

The only requirement for joint nomination was in Chapter 19577, and having held that that part of the chapter was repealed, it is not necessary to answer your fourth question.

April 10, 1945.—045-94.

TRUSTEES—CHANGE OF RECOMMENDATIONS FOR APPOINTMENTS

QUESTION: What can the school trustees do about changing their recommendations for appointment of teachers after the time for filing such recommendations has elapsed?

To Mrs. D. L. Adkison, Member of the Board of Trustees, Milligan, Florida:

Believing that two former teachers were unwilling to be reappointed, you state that the school trustees recommended two new teachers for the positions within the time allowed for filing recommendations. Now the trustees have learned that the two former teachers wish to be reappointed and the trustees would like to have them reappointed. You also state that your school closes on April 27 and that, therefore, the time for filing recommendations has elapsed but that the board of public instruction has made no appointments, under the trustees' original recommendation, or otherwise.

So long as no appointments have been made by the board of public instruction, a majority of the trustees could file a written withdrawal of their recommendations, explaining their reason therefor, and recommending the two former teachers. While under the law the board of public instruction would have the right to make appointments of persons of their own selection upon the withdrawal of your recommendations made within the statutory time, they should follow your subsequent and amended recommendations, even though the latter recommendations were not within the time allowed by the statutes, if, in fact, they have made no appointments in the meantime and if the material rights of other parties have not intervened.

July 19, 1946.—046-335.

TRUSTEES—RACING FUNDS—CONTROL

QUESTION: What control, if any, do the district trustees have over the expenditure of racing funds allocated for repair of a district school building?

To Mr. Alston Campbell, Chairman, School Trustees, Laurel Hill, Florida:

Section 230.43 covers the duties and responsibilities of the trustees. Subparagraph (10) of that section reads as follows:

"To have general supervision of the buildings, grounds, equipment, and other property of the schools of the district and to recommend to the county superintendent or to the county board at an official meeting such repairs and alterations as may be considered necessary; provided that trustees, subject to regulations of the county board, may be authorized to make minor and emergency repairs; and, provided further, that when the title to property in the district is held by the trustees at the time the school code becomes a law, the county board shall delegate to the trustees of such district responsibility for using district current school funds of the district within limits set by the budget to maintain buildings and other property in the district in a state of good sanitation and repair and for keeping such property properly insured."

Section 230.23(11) makes it the duty of the county board to:

"Approve plans after considering any recommendations which may have been submitted by the trustees of the districts concerned, for locating, planning, constructing, sanitating, insuring, maintaining, protecting, and condemning school property as prescribed in Chapter 235, . . ."

Subparagraph (c) reads in part as follows:

"Provide adequately for the proper maintenance and upkeep of school plants, . . ."

It will be observed from the above that the trustees merely recommend as to repairs, except where the title to the district school property was held by the trustees at the time the school code became a law, July 1, 1939, when the trustees shall have delegated power to use district current school funds within limits set by the budget to effect repairs and maintain district school buildings. I do not know whether title to the district property in your district was in the trustees on July 1, 1939, but regardless of that, the racing tax money is not district current school funds and that provision of the act would, therefore, not give the trustees final authority on matters of repair.

Aside from the exception just mentioned and which does not cover your situation, it will be observed from the quoted portions of Section 230.23, that it is the duty of the school board to consider recommendations by the school trustees on questions of repair, but having done so, the final authority and determination on matters of repairs of district as well as other school buildings is to be made by the school board.

Your letter states that the school board is wasting money in connection with repairs. I know nothing about that other than as stated in your letter. If any public official, by fraud, as distinguished from poor judgment or discretion, is wasting public funds he can be enjoined, but as to that it will be necessary for you to consult private counsel.

August 23, 1946.—046-380.

SCHOOL BOARD—REDISTRICTING—APPOINTMENTS

QUESTION: The population of Pinellas county according to the 1945 state census is in excess of 80,000. At the regular session of the board of public instruction of said county, and in pursuance of Section 230.04, Florida Statutes, 1941, the board redistricted the county into five school board election districts. As result of such action, the school board member formerly from old district no. 3, his term expiring in January, 1947, now is in new district no. 5; the member formerly from old district no. 1, his term expiring in January, 1947, now is in new district no. 2; and the member formerly from old district no. 2, his term expiring in January, 1949, now is in new district no. 3. No persons have as yet been officially commissioned and qualified for new districts numbered 4 and 5. On the basis of such statement of facts, what, if any, appointments should be made by the governor to provide for the five-member board now resulting from such redistricting?

To Honorable R. A. Gray, Secretary of State:

At the outset, it is noted that Chapter 17747, Laws of Florida, Acts of 1937, does not apply to Pinellas county, and this discussion ignores the law applicable to counties controlled thereby.

The 1945 state census giving Pinellas county a population in excess of 80,000 population, the duty devolved upon the board of public instruction of said county, at a meeting in January, 1946, to change its county board election districts from three to five in number. (Sections 230.04, 230.07, Florida Statutes, 1941). That duty of the board was a continuing one and was performed in April, 1946. Had the board in the performance of that duty numbered the new districts so that the members of the old three-member board each was in the same numbered district as he was prior to the redistricting, considerable of the difficulty here found would have been avoided. However, that was not done.

Section 230.09, Florida Statutes, 1941, provided that at the general election in 1940 (first after the enactment of the school code), with respect to "five-member board counties," in counties theretofore having a three-member board, school board members from districts 1, 3 and 5 should be elected for four-year terms, members from districts 2 and 4 should be elected for two-year terms, and that at the general election in 1942, members from districts 2 and 4 should be elected for four-year terms, and that thereafter successors to such board members at all subsequent general elections should be for four-year terms. Said Section 230.09 further provided that "this section shall not operate to displace or in anywise disturb any present school board member during the term of office for which he was elected or appointed." While this provision particularly related to the unexpired terms of those members in counties undergoing transition, with the adoption of the school code, from three- to five-member boards, it is my judgment it is equally applicable in the instant case. It is recognized that the conclusions reached in this opinion contemplate that temporarily certain of the new districts will have residing therein more than one board member and that certain of the district will not have residing therein a member. Under my understanding of the applicable law, this would seem unavoidable in effecting the transition from a three- to a five-member board. If the change is not "to displace or in anywise disturb any present county board member during the term of office for which he was elected or appointed," as provided by said Section 230.09, then it would seem there is no requirement that, having been elected and having qualified for a certain numbered district, a member should do anything further to qualify to continue on the board as the member from the new district of similar number resulting from the redistricting. Any attempt to identify such old member as being from the differently numbered district where he now resides is to ignore the numbered district from which he was elected, for which he qualified and for which he was commissioned; and any attempt to so harmonize such discrepancy by requiring new appointment, qualification and commission for such member for the differently numbered district where he now resides would contemplate a vacancy in office, hence a displacement or disturbance within the meaning of said Section 230.09.

It might be argued that only by following the exact pattern fixed by said Section 230.09 could the overlapping terms contemplated by Section 230.09 be assured and such system established with certainty, that is to say, that only members from districts 2 and 4 under any circumstances could be voted for in the general election of 1946 and only members in districts 1, 3 and 5 under any circumstances could be voted for in the general election of 1948. However, it is pointed out that under said Sections 230.08 and 230.09, as to three-member county boards, the member from district no. 2 was elected in 1940 for four years, and the members in the odd-numbered districts, viz., 1 and 3, were elected in 1942 for four years, which normally contemplated that with respect to a three-member board the odd-number members would be required to run in the general election in 1946. In the absence of specific statutory directions as to how the transition from a three- to a five-member board should be accomplished, it seems that the reasonable rule would be that such transition should not contemplate vacancies in office to be filled by appointment by the governor if such can be avoided and the overlapping terms of office required by said Section 230.09 can be preserved; hence, it would seem that as to the Pinellas county board the pattern has been fixed, that is to say the members from the odd-numbered districts, namely, 1, 3 and 5, should be elected in the general election of 1946 and each four years thereafter, and the members from the even-numbered districts of 2 and 4 should be elected in 1948 and each four years thereafter.

In view of the foregoing, in my opinion the above question properly is answered as follows:

(1) The duly elected and qualified member from old district No. 1 without further appointment or qualification remains the duly qualified member from new district No. 1, his term of office expiring in January, 1947, his successor for new district No. 1 to be elected at the general election in 1946, to take office on the first Tuesday after the first Monday in January, 1947.

(2) The duly elected and qualified member from old district No. 2 without further appointment or qualification remains the duly qualified member of said board for new district No. 2, his term expiring in January, 1949, his successor for new district No. 2 to be elected at the general election in 1948, and to take office on the first Tuesday after the first Monday in January 1949.

(3) The duly elected and qualified member for old district No. 3 without further appointment or qualification remains the duly qualified members of said board from new district No. 3 his term expiring on the first Tuesday after the first Monday in January, 1947, his successor for new district No. 3 to be elected at the general election in 1946, to take office on the first Tuesday after the first Monday in January, 1947.

(4) The governor properly may appoint a member of said board from new district No. 4 for the period intervening between now and the first Tuesday after the first Monday in January, 1947, his successor for new district No. 4 to be elected at the general election in 1946 for a two-year term expiring the first Tuesday after the first Monday in January, 1949, a successor to such last-named officer to be elected for a regular four-year term in November, 1948. With respect to this office, it is pointed out that we are concerned with the filling of newly created offices in such manner as to accord as closely as possible with the plan and pattern for the election of five-member boards as provided by Section 230.09, Florida Statutes, 1941. Hence, the factual situation here is different from that found in advisory opinion to governor, 19 So. 2d. 198, which dealt with an appointment for the balance of an unexpired term, such term being one then and therefore existing under the law, and the resigning incumbent having been elected for such term.

(5) The governor properly may appoint a member of said board from new district No. 5 for the period expiring in January, 1947, successor to such appointee to be elected at the general election in 1946, to take office on the first Tuesday after the first Monday in January, 1947.

(6) No opportunity was afforded for nomination in the 1948 primaries of certain of the candidates for the offices of member of said board required to be voted for in the 1946 general election. No "vacancy in nomination" exists within the meaning of such phrase as used in Section 102.48, Florida Statutes, 1941, where no nomination has been made in the primaries—see *State vs. Tyler*, (Fla.) 130 So. 721; but the situation here seems to fall within the rule announced in *State vs. Mitchell* (Fla.), 159 So. 776, and *State vs. Gray* (Fla.), 160 So. 501. Nominees for these offices selected by appropriate party executive committee, duly certified, sworn to and filed as required by Section 99.10, Florida Statutes, 1941, appear to be entitled to have their names placed upon the general election ballot to be used in the 1946 general election. This mode of nomination is in harmony with our opinion 044-258, dated August 31, 1944.

This opinion treats the inquiry as desiring the law under the new population status of Pinellas county without reference to any attempt to make the named appointments by the governor effective. If it is desired that this office render an opinion on the law and its interpretation so as to give effect to the appointments indicated in the request to have been made by the governor, we would like to have a request so stating and would, thereupon, write an opinion to conform.

October 22, 1945.—045-329.

INSTRUCTIONAL UNITS—ALLOTMENT

QUESTION: Is it necessary for the county board to assume the responsibility of the actual administration of a school before instructional units can be allotted?

To Honorable Colin English, State Superintendent of Public Instruction.

In your letter of October 12 you explained that in one of the counties it has been impossible for the board to provide high school facilities for a great many negro high school children in the district in which they live, because of inability to obtain buildings, and that the adjoining school district is already overcrowded. It appears from your letter that in order to supply school facilities for these colored children, the county board has leased some rooms in a private school and assigned 99 students to the school, paying the expenses involved. I understand from your letter that the administration of the school is actually in the hands of the private school and not in the county board.

Section 230.23 (11) (b), Florida Statutes, 1941, permits, when necessary, the renting of a building for school purposes. This would include the renting of rooms. Section 230.23 (6) (b) requires the county board to provide adequate facilities for school children, and authorizes the board, in so far as possible, to arrange with another school district or even another county, where that is necessary, to provide the facilities. There is no authority for the county board to send public school students to a private school, or one which is not administered by the public school authorities. If the county board rents a building or rooms to be used as a school, the duties are the same as in any county-owned school building. Said board must exercise the same control and administration as it does in any other county or district schools. Unless it exercises such complete control and administration, it would not be entitled to allotment of any instructional units, because said school would not be a public school. Section 236.03 of the statutes authorizes such allotments only in the public schools. It is not a public school unless controlled and administered by the public school authorities.

April 25, 1946.—046-173.

RACING FUNDS—DIVISION BY COUNTY

QUESTION: May the Board of County Commissioners withhold from the County Board of Public Instruction that portion of the Racing Funds payable to the county and allocated to the Board of Public Instruction by Chapter 23212, Special Acts of 1945, until the Board of Public Instruction prepares its budget for the next year, or are such funds to be transferred to the Board of Public Instruction immediately upon their receipt?

To Mr. Roger Weaver, Superintendent of Public Instruction, Inverness, Florida:

Section 1 (B) of Chapter 23212, Special Acts of 1945, in part reads as follows:

"That in the fiscal years A. D. 1945-1946 and A. D. 1946-1947 that after first deducting the sum of THREE THOUSAND FIVE HUNDRED (\$3,500.00) DOLLARS as mentioned in subsection (A) herein, that then 40% of the remaining monies shall be paid to the County Board of Public Instruction of said County and shall be expended as hereinafter set forth . . ."

There is nothing in the Act or elsewhere which authorizes the Board of County Commissioners to withhold such funds from the Board of Public Instruction until the latter prepares its budget. The 40% payable to the County Board of Public Instruction should be paid over promptly upon its receipt.

February 1, 1946.—046-40.

SALE OF BUILDINGS—RENTAL TO STUDENTS

QUESTIONS: 1. May the board of public instruction sell public school buildings and school property to the city in which located for cash and other lands upon which to erect new school buildings, and if so (a) is approval of the State Board of Education required; (b) should the matter be submitted to a referendum vote and (c) after such sale may the school board lease the buildings from the city for school purposes?

2. Is the board of public instruction authorized to erect living quarters on public property for rental to school teachers?

3. Is it lawful for the board of public instruction or any of the school officers or personnel to require a deposit as security for the return of state-owned textbooks loaned to pupils?

To Honorable Julian H. Ross, Attorney for the Board of Public Instruction, Broward County, Ft. Lauderdale, Florida:

Section 230.23 (4) of the statutes of 1941 authorizes the sale of school real or personal property by the county board. You will, of course, want to be satisfied that the city has authority to make the purchase and that all necessary procedure is followed by the city in making the purchase. I am aware of no statute requiring approval of the State Board of Education for such sale. In the absence of a special act there appears to be no statutory authority for the board to directly submit the question of sale to a referendum vote. In the event the school board should find it necessary to lease the school buildings after the sale and pending new construction, ample authority is contained in Section 230.23 (11) (b).

Even though it may be very difficult for teachers to obtain living quarters, the school board has no authority to erect living quarters for rental to the teachers.

In certain sections of the state there are frequent losses of textbooks due to migratory population. There is no authority in the law for requiring a deposit to secure the return of the loaned textbooks. To require such deposits might in some instances defeat the very purpose of free textbooks. Various means have been adopted, but apparently the most effective lawful measure has been insistence upon the principal and teacher carefully observing their statutory duties in regard to accounting for textbooks. It has been found effective to take whatever time may be necessary to impress upon each parent the necessity for the return of the books, and even more effective to impress that responsibility by a short talk with each individual pupil.

January 4, 1946.—046-1.

PURCHASE OF SUPPLIES WITHOUT BIDS

QUESTION: May the board of public instruction lawfully authorize the purchase of supplies of small value, that is, in amounts of less than \$300.00, from a corporation in which a trustee is a large stockholder, or from a corporation in which a trustee is a large stockholder on a day to day basis as needed and not involving the making of a contract for future delivery?

To Honorable Edwin C. Coffey, Attorney for the Board of Public Instruction, Jacksonville, Florida:

In your letter you refer to Section 230.23 (12) (i) of the Statutes of 1941, which reads as follows:

"To contract for materials, supplies and services needed for the county school system: Provided that no contract for supplying these needs shall be made with any member of the county board, with the county superintendent, or with any trustee in the county, or with any business organization in which any county board member, the county superintendent, or any trustee has any financial interest whatsoever, except that any trustee may submit sealed competitive bids and be awarded a contract as provided by law for the lowest and best bid."

It is my opinion that the quoted Section 230.23 (12) (i) relates to contracts for the purchase of supplies and materials regardless of whether the amount of the contract is more or less than \$300.00.

It is to be remembered, however, that in addition to the quoted section there are other statutes which relate to the purchase of materials and supplies by the county board. Section 237.02 (1), (2), (3) and (4) of the Statutes of 1941, sets up the procedure to be followed by the county board in making purchases. Among other things, the statute requires the board to endeavor to obtain maximum value for all expenditures as to purchase materials best adapted to the needs at the lowest prices; it imposes on the board the duty to set up a plan for purchases, which plan obviously must be consistent with the statutes. It requires bids from three or more sources for any authorized purchase costing more than \$300.00.

The board's budget will show substantially what may be needed in supplies and materials, and the plan for making purchases which may be adopted by the board should, in general, include bids and contracts for all purchases, regardless of the amount, which can be conveniently and more economically made in that manner.

May 3, 1946.—046-187.

BOND ADVERTISEMENT—TIME

QUESTIONS: 1. Under the terms of a resolution of a county board authorizing issue of refunding bonds for a special tax school district, set out below, is the county board required to readvertise for tenders of bonds after an advertisement failed to produce any tenders?

2. If the foregoing question is answered in the negative, is the board required to wait six months from the date of its last call for tenders to issue call for redemption of the bonds?

To Honorable Colin English, State Superintendent of Public Instruction:

A few years ago a county board issued refunding bonds for a special tax school district. The resolution authorizing the bonds, among other things, provided that whenever the board should have a surplus of a named amount in the fund created for the payment of bonds and interest over and above current requirements the board should use such surplus to purchase its bonds by advertising for sealed tenders, but none of such bonds should be purchased at a price in excess of the callable price as fixed by the resolution. If the board was not satisfied with any such tenders received it might reject same "and within 30 days after such rejection it shall readvertise and give notice for additional sealed tenders in the same manner as hereinbefore provided, and purchase the bonds offered at the lowest prices upon such readvertisement, absorbing all funds available." The resolution contained a further provision authorizing the board to privately purchase additional bonds with subsequent surplus accumulations, following each respective tender date, at a price not in excess of the most favorable price at which bonds were tendered at the last preceding tender date. The resolution also contained the following paragraph:

"Whenever the said board shall have been unable, for a period of so much as six months, to apply surplus funds to the purchase of bonds at a price less than the callable price, it shall proceed to call such bonds by lot as hereinafter provided in order to permit application of the full amount of funds available."

A further provision of the resolution empowered the board to call any or all of the bonds at par plus accrued interest on any interest payment date.

The refunding bonds contain none of these recited or quoted provisions, except the right reserved by the board to call the bonds for redemption at par plus interest on any interest payment date.

Advertisement and notice calling for tender of bonds was duly published and given in the manner required by the resolution but no bonds were tendered.

It is my opinion that the provisions of the resolution in regard to advertising and readvertising for tenders is for the benefit of the board, and unless the board has good reason to believe that a readvertisement would produce tenders at a price more favorable to the board than par plus accrued interest they have no duty to readvertise. This is in answer to your first question.

It is my opinion that it is unnecessary for the board to wait six months after the last date set for tender of bonds in order to issue a call for redemption at par plus accrued interest, but on the contrary, they may issue such call for the next interest paying date.

August 18, 1945.—045-247.

QUALIFICATIONS OF ELECTORS IN SCHOOL TRUSTEE ELECTIONS

QUESTIONS: 1. What are the qualifications of electors to vote in school trustee elections, provided for by Section 230.37, Florida Statutes, 1941?

2. Would election managers be liable to prosecution under any criminal statute of Florida for refusal to allow such qualified electors to vote at such trustee election?

To Honorable Sam D. May, County Judge, Chipley, Florida:

Section 230.37, mentioned in your question, provides for the election of trustees, their qualifications, time of election, term of office, etc.

Section 10, Article XII, of the constitution authorizes the legislature to provide, (1), for the division of any county into convenient school districts, (2), for the biennial election of three school trustees who shall hold their office for two years and who shall have supervision of all schools in the district, and (3), for the levying and collection of a district tax for the exclusive use of the public free schools within the district, whenever a majority of the qualified electors thereof who have paid a tax on real or personal property shall vote in favor of such levy. It will be observed that the Constitution appears to require that the elector be a taxpayer only when the question submitted is under (3), that is, the levy of a district tax.

Section 236.32 (2) provides for the regular biennial school district election, at which time the trustees are elected. Section 236.32 (2) (d) reads as follows:

"All qualified electors residing within any school district of the State of Florida whose voting registration is in that district, who pay a tax on real or personal property within the district, shall be entitled to vote in this election."

There is grave doubt whether Section 236.32 (2) (d) is constitutional in so far as it appears to require that an elector be a taxpayer in order to vote on questions other than levying and collection of a district school tax. However, until our court has held such statute unconstitutional in that respect, it is the duty of the school and election officials to follow the statute and limit the voting to those electors who pay a tax on real or personal property within the district. The statute definitely implies such restriction. In the absence of such court ruling, a qualified elector in all biennial school district elections, as set out in Section 236.32, is an elector residing within the district and whose registration is in such district and who pays a tax on real or personal property within the district. Obviously the words "qualified elector" exclude those persons who for various causes and reasons, such as set out in Section 98.01 of the statutes, are denied the right to vote in any election.

If any election official should refuse to allow a qualified elector, as above defined, to vote for trustee, it is my opinion that he could be prosecuted under Section 875.10, Florida Statutes, 1941.

August 22, 1945.—045-255.

COUNTY BOARD ELECTION DISTRICTS

QUESTIONS: 1. In the adoption of Florida Statutes, 1941, did Section 230.04 repeal conflicting provisions of Section 404, Chapter 19355, Acts of 1939 (School Code)?

2. If the foregoing question is answered in the affirmative, when should the county board election districts be increased and when should the two additional county board members be elected in counties which, according to the 1945 state census, for the first time had a population in excess of 80,000?

To Honorable J. R. Wells, Attorney for the Board of Public Instruction, Orlando, Florida:

Section 404 of Chapter 19355 (School Code), provided that in all counties, which, according to the 1935 state census, had 80,000 or more population, the county board should be composed of five members and in counties of less than 80,000 population, the board should be composed of three members. That section was revised by the adoption of the statutes in 1941, the revision of that statute appearing as Section 230.04. The revision substituted "last preceding census of the State of Florida" for "1935 census of the State of Florida." Section 230.04 became effective upon the adoption of the Statutes of 1941, and anything in Section 404 of Chapter 19355 in conflict therewith was repealed. Any question of what effect the revised provision (Section 230.04), would have if a county of over 80,000 population showed a decrease below that figure in a later census, is definitely hypothetical and does not require an answer. No such situation appeared under the 1945 census and none could arise before 1955, and is not likely then.

The school code made no provision for redistricting, election of additional school board members, etc., in counties subsequently coming into the 80,000 or more population bracket. However, in order to put the school code into effect after its enactment in 1939, it was necessary to provide for the establishment of new county board election districts; and the nomination and election of board members, and the procedure to accomplish that purpose was set up in the code. It appears in Sections 230.06 to 230.09. The situation in counties which for the first time came into the 80,000 population bracket by the 1945 census is quite similar to that existing at the time the school code became effective in regard to redistricting and nomination and election of additional school board members, and it is my opinion that as nearly as possible the procedure set out in Sections 230.06 to 230.09 should be followed in counties which

came into the 80,000 population bracket under the 1945 census. This would mean that in such counties, the county board should first determine the boundaries of the five districts according to the plan set out in Section 230.06 (1). At any meeting in January, 1946, the board should fix the boundaries by resolution, record and publish the same, all as provided in Section 230.07. Then, after providing for overlapping terms of the board members (Section 230.08), there would follow the nomination of candidates as provided in Section 230.08, and election of county board members in the general election in 1946. Section 230.09.

July 16, 1945.—045-212.

ATTENDANCE AREAS—DETERMINATION

QUESTIONS: 1. Should attendance areas for schools within a district be determined by the county board or may they be determined by the trustees of the district?

2. After attendance areas have been properly determined, may the county board or the trustees require that the children attend the school serving the area in which they reside?

3. If adequate school facilities are provided by the school serving the attendance area in which a child resides, would the parents have any recourse to compel attendance of their child at another school in which the school officials are seeking to relieve overcrowded conditions?

To Honorable Colin English, State Superintendent of Public Instruction:

You explain that some of the schools in a certain school district are seriously overcrowded, while in other schools in the same district there are vacant rooms; that the trustees of the district have a plan for approving transfers whereby a parent may have his child assigned to a school within an area other than that in which he resides.

Attendance area is defined in Section 227.13 (10) as:

"The area from which pupils are designated to attend a given school; that is, the territory served by any given school."

Section 230.33 (6) (a) requires the county superintendent to "recommend the location of schools . . . and the area from which the children should attend each school, provided that the recommendations affecting district schools shall first be submitted to the trustees of the respective school districts as hereinafter provided."

Section 230.23 (6) (a) makes it the duty of the board of public instruction to "approve the area from which children are to attend each school, such area to be known as the attendance area for that school."

Article XII, Section 10, of the constitution, gives the trustees supervision of the district schools.

The question is not free of doubt. There is no completely satisfactory definition of the word "supervision," but considering other matters included by our supreme court as being within the meaning of that word as used in the constitution, I think supervision may well include the determination of attendance areas of district schools.

The authors of the school code, no doubt through oversight, failed to "hereinafter provide" duties or powers of the trustees in regard to attendance areas, as set out in Section 230.33 (6) (a).

It will be observed that the county superintendent is required to "recommend." The statute does not state to whom he shall recommend. Under the school code, he sometimes makes recommendations to the trustees and at other times to the board. It will also be observed that the county board only "approves" attendance areas.

Under the above proviso in Section 230.33 (6) (a), the superintendent's recommendations as to attendance area must be submitted to the trustees and I am of the opinion that this means directly by the superintendent to the trustees. Obviously, they are submitted for some kind of action by the trustees. It is my opinion that the superintendent's recommendations are submitted to the trustees for the latter's determination, but that such determination is not final until approved by the county board. It is my further opinion that it is the duty of the county board to approve the determination by the trustees in all cases except where the attendance area fixed for a school may overtax the capacity of schools in that area, and when there is ample room in the schools of an adjoining attendance area, or where for any cause the area fixed by the trustees is clearly unreasonable, unfair, or impracticable.

Attendance areas are designed to fix the areas from which pupils living therein may attend a certain school, and if they attend the public free schools they may be required to attend their area school. I think it would not be unreasonable to permit the child to attend a school within the district other than its area school if ample facilities exist in the former, but it should never be permitted to such extent as to overtax or strain, or in any manner adversely affect the efficiency of the school. I think it is within the province of the school board to adopt general regulations governing the matter.

Assuming that there is room in the child's area school and comparable facilities, the parents of the child have no recourse to compel attendance of their child at another school at which the school officials are seeking to relieve an already overcrowded condition.

June 4, 1946.—046-243.

WATER SYSTEM OPERATION—PAYING CUSTOMERS

QUESTIONS: 1. May a board of public instruction acquire, operate and maintain a water system located on property to be conveyed to the county board for use of a public school?

2. If the foregoing question is answered in the affirmative may the county board supply water from the water system thus acquired to owners or occupants of residences adjoining the school property?

To Honorable Colin English, State Superintendent of Public Instruction:

It appears that Cherry Lake, Incorporated, proposes to grant to the county board of public instruction of Madison county several buildings and the land on which they are located at Cherry Lake, to be used by the county board for public schools. When the project was built a water system was installed on the property to serve the whole community. The wells, pumps, etc., are located on the school part of the property. Adjoining that portion of the project to be conveyed to the school board are a number of residences which have been supplied with water from the water system. Presumably, the owners acquired their residences on the assumption that water would be supplied to them from the wells installed by Cherry Lake, Incorporated. No other water is presently available to them. They pay a small water rent for this service.

Ample authority exists in the statutes for the acquisition of the water system. The statutes require the county board to see that adequate water supply is provided for the schools, and this they may do by whatever means or methods may be most advisable under the circumstances. See Sections 230.23 11 (c), 235. 26 (19) (20). The county board has the authority and power to acquire, operate and maintain such a water system for school purposes.

Your first question is answered in the affirmative.

"Powers of board of public instruction are limited by statute and may not be extended by construction. Board of public instruction should not assume authority when right to exercise thereof is doubtful." (Harvey v. Board, 133 So. 868)

Whether this decision should be relegated to the discard or whether time and experience have outmoded this concept (Taylor, et al v. Board, So., opinion filed May 21, 1946) might be debatable, but in my opinion, under all ordinary circumstances should still be the law.

I do not think that even with this recent decision of our supreme court, enlarging as it does our school programs, the school board would be authorized to go into the business of furnishing water to consumers and charging a consideration therefor. If this were the law, I could easily picture our school boards going into the business of selling supplies, groceries and what not to purchasers under the guise of a school program.

Under the peculiar circumstances of this case, however, and **only because of such peculiar circumstances**, I think that the board might be justified in permitting the occupants of the residence adjoining the school property to be served from the water supply of Cherry Lake, Incorporated, and charging a reasonable sum for these services, so long as the board is under no obligation to maintain the water mains or other water equipment off the school property.

May 21, 1945.—045-118.

USE OF SCHOOL PROPERTY

QUESTION: May the county board or district trustees grant any concession or enter into any agreement with any individual or organization to operate on the school premises any project which is operated for profit, such as a stand selling school lunches, soft drinks, school supplies, etc.?

To Honorable Colin English, State Superintendent of Public Instruction:

Section 230.43 (11) and 235.02, Florida Statutes, 1941, in permitting certain nonschool use of school premises, restrict such activities or use to civic, social, recreational and community purposes, legal assemblies, community play centers, and voting places in primary or other elections. There is no authority in the statutes for granting concessions on any part of the school premises for business purposes. Your question is, therefore, answered in the negative.

March 16, 1945.—045-77.

SCHOOL BONDS—LIABILITY FOR INTEREST AFTER MATURITY

QUESTION: May a county board pay interest after maturity on a school bond which has not been reduced to judgment in a case where funds were not available to pay the bond when it matured?

To Honorable Colin English, State Superintendent of Public Instruction:

Our Circuit Court of Appeals in Board of Public Instruction for Brevard County vs. Osburn, 101 Fed. (2d) 919, held that under the facts and circumstances set out in your question, the county was liable for interest after maturity. In that case the Circuit Court of Appeals was construing the Florida law. Being liable for the interest, the county board not only may pay such interest, but should pay it.

PERSONNEL OF SCHOOL SYSTEM

December 8, 1945.—045-394.

CERTIFICATION OF NONTEACHING EMPLOYEES

STATEMENT: Effect of proposed regulations of the State Board of Education relating to the certification and classification of school personnel other than members of the instructional staff (Section 231.34, as amended by Section 1 of Chapter 22839, Laws of Florida, Acts 1945).

To His Excellency The Governor:

I have read the proposed regulations which bear the date December 1, 1945, and after considering the same I think it advisable for each member of the board to give due consideration to the matter before the board meeting; and in that connection I wish to call attention to the effect of such regulations if they should be adopted.

The regulations propose to "certify" practically all, if not all, employees connected with the schools. Included are employees in administrative work of the schools, school health service employees, accounting, bookkeeping, stenographic employees, clerical employees, custody and maintenance employees, janitors, bus drivers, transportation maintenance employees, managers and employees of school lunchrooms, etc.

This proposed "certification" of nonteaching employees was authorized in 1943, Section 1 of Chapter 22839, providing that "the State Board of Education shall have authority to classify school services and to prescribe regulations in accordance with which certificates shall be issued by the state superintendent to school employees who meet the standards for their class of service."

Such classification and certification might be harmless in itself but at the same session of the legislature (1945) the definition of "teacher" in the teachers' retirement system was also expanded to include "any certificated employee of the public free schools, etc." In other words, if the proposed regulations for certificating school employees should be adopted, all those newly certificated nonteaching employees would be eligible for membership in the teachers' retirement system. I think we have for serious consideration whether or not the teachers' retirement system should be thus expanded to include nonteaching employees. The legislature did not by its own act include such employees but has left it to the discretion of the State Board of Education.

I might point out that under the teachers' retirement system as originally enacted in 1939 eligibility was confined to "teachers," and by that act a "teacher" was defined to be a person employed as "a teacher or principal in the public free schools by the county board of public instruction." It even specifically excluded teachers in the schools of higher learning. The definition of teachers and, therefore, those eligible for membership in the retirement system has been expanded at each succeeding session of the legislature except in 1943. In 1941 by an amendment "teacher" was expanded to include members of the professional staff, vocational schools, the institutions of higher learning, the Boys' Industrial School and the Girls' Industrial School, the State Board of Education, and county superintendents.

In 1945 "teacher" was once more expanded to include "any certificated employee of any public free school, of any county school system, and vocational school," as well as "any certificated employee of the State Department of Education and any certificated employee of the retirement system."

The teachers' retirement system was originally planned and set up and established to provide for a very special class of public employees,— school teachers. It was recognized that school teachers occupy a very different position from other public employees and require quite different consideration from that given to other general public employees by reason of the work which they are performing, their more or less inadequate compensation, etc. My thought is that it is much to the best interest of the teachers of the state that their retirement act should be confined to the teachers and that there should not be incorporated into the teachers' retirement system any more nonteaching employees. Nonteaching employees of the public schools occupy the same position as other public employees and should naturally and properly come within pension and retirement provisions which may be established for other general public employees.

COUNTY SCHOOL OFFICERS AND PERSONNEL

January 29, 1946.—046-74.

SICK LEAVE—COMPENSATION

QUESTIONS: 1. Does Chapter 22615, Acts of 1945, authorize a thirty-day leave for injury or sickness incurred in line of duty in addition to the ten-day leave authorized by Section 231.41 of the Statutes of 1941, and if so, may the school board compensate the employee for both?

2. If the employee receives workmen's compensation under the provisions of the Workmen's Compensation Act, will the county board reduce its compensation to her by the amount she receives under the provisions of the Workmen's Compensation Act?

3. If the board pays the employee her full salary for the period involved, does the board have the authority to request the recipient of workmen's compensation to endorse her workmen's compensation check back to the board?

To Honorable Colin English, State Superintendent of Public Instruction:

Section 4 of Chapter 22615 reads, in part, as follows:

"This Act shall not operate or be construed to repeal Section 540 or 541 of Chapter 19355, Laws of Florida, 1939, nor any amendment thereof, but shall be cumulative thereto; . . ."

In my opinion the word "cumulative" in the quoted provision requires a construction allowing a thirty-day leave for illness or sickness in line of duty in addition to that authorized by Section 231.41 of the statutes. The county board may compensate the teacher for both.

The Workmen's Compensation Law makes the employer liable for all medical, surgical, hospitalization and similar expenses in addition to weekly allowances to the injured employee. If an employee were permitted to receive both salary or wages and workmen's compensation weekly benefits, the employee would receive more than he would receive had there been no inquiry, and this would be in conflict with the whole theory of the Workmen's Compensation Law. It is my opinion that the county board should reduce its compensation to the teacher by such amount as the latter receives under the provisions of the Workmen's Compensation Law.

Answering your third question, the board may request the recipient of workmen's compensation to endorse his compensation check back to the board, but could not force him to do so if he should refuse. The board can protect itself by deducting the amount from the employee's compensation payable to him currently or later. The deductions referred to herein do not include any sums allowed or payable for medical, surgical, hospitalization or similar expenses.

July 16, 1946.—046-306. •

ENFORCED SICK LEAVE—SALARY

QUESTIONS: 1. Where a school teacher was quarantined by the health department for seven days because there was a case of polio in the house adjoining hers, is she entitled to pay for all or any part of the time thus absent, and if so, should the time absent be counted against her statutory sick leave?

2. Where the minor daughter of the school principal had diphtheria and the principal was for that reason quarantined by the health department for ten days, but the principal would have been able and was willing to be at school if the health department would have permitted, is she entitled to pay for the time quarantined, and if so, should those days be charged against her sick leave?

To Honorable Colin English, State Superintendent of Public Instruction:

Ordinarily an employee is not entitled to pay for time absent from work because of the employee's illness or other disability. The harshness of that rule has been softened to some extent for the instructional staff of the schools by Sections 231.40 and 231.41 of the statutes which make certain allowances for sick leave, illness-in-line-of-duty leave, etc.

The relevant portion of Section 231.40 reads as follows:

"Any member of the instructional staff employed in the public schools of the state who is unable to perform his duty in the school because of illness, or because of illness or death of father, mother, brother, sister, husband, wife, or child, and consequently has to be absent from his work shall be granted leave of absence for sickness by the county superintendent or by someone designated in writing by him to do so."

After full consideration of the statute I am convinced that the intention of the legislature requires a liberal construction. While legal restraint under quarantine by the health department may not, in a strictly technical sense, be sickness or illness, it is nevertheless segregation of a person by the health authorities based upon reasonable suspicion that the quarantined person may be in an incipient's stage of a disease or sickness or a carrier of the disease or sickness. Quarantine is primarily for the benefit of the public. It is my opinion that the condition of being quarantined by the health authorities should be considered the same as if the teacher were sick and that the words "sickness" and "illness" in the statutes on this subject should be construed to include quarantine when ordered by the health department.

This conclusion requires that the teacher described in each of your questions be allowed pay for her absence under quarantine up to the number of days of her accumulated sick leave.

March 23, 1945.—045-69.

TEACHERS—COMPENSATION ON LEAVE OF ABSENCE

QUESTION: If there should be an exchange of teachers between the Dade county school system and the Havana, Cuba, school system, may Dade county supplement from the general county school funds the salary paid to the Dade county teacher sent to Havana in the event the salary paid in Havana is lower than the regular salary schedule paid in Dade county?

To Honorable Colin English, State Superintendent of Public Instruction:

You explain the importance of having better trained teachers available for the teaching of Spanish, and in order to supply that need, there is a plan for exchange of teachers between the Dade county school system and the Havana, Cuba, school system.

Section 231.17, Florida Statutes, 1941, was amended by Chapter 21989, Acts of 1943, by adding two provisos, one of which is as follows:

"... provided that the state board shall have authority to prescribe regulations under which provisional certificates may be issued to citizens of other friendly nations who are assigned to teach in the state on an exchange basis or who may be needed to teach foreign languages; ..."

Under the foregoing amendment, it is my opinion that there is implied authority for exchange of teachers, and a noncitizen teacher who is obtained in the exchange, to teach a foreign language, may be granted a provisional license under such regulations as the state board may adopt. No provision whatever is made relative to the Florida teacher who is sent to the foreign country, and the exchange, so far as the Florida teacher is concerned, can be completed only by granting him an extended professional leave.

The following sections of the statutes are applicable.

Section 231.39, in part, is as follows:

"... County boards shall also have authority to prescribe regulations for the granting, and with the approval of the trustees of the district in which the person is serving, to grant more extended leaves of absence, as follows:

"(1) **EXTENDED PROFESSIONAL LEAVE.**—Extended leave for professional improvement may be granted for a period of not to exceed one year to any member of the instructional staff who has served satisfactorily and successfully in the schools of the county for a period of three or more years; provided, that partial compensation may be authorized only when the person has served in the county for seven or more years."

and Section 231.42 reads:

"Any member of the instructional staff who finds it necessary to be absent from his duties for professional reasons or is assigned by the county superintendent under regulations of the county board to be absent for professional reasons may apply for professional leave during such absence. Such leave may be granted under regulations of the county board. The county board shall also prescribe by regulations, subject to any regulations of the state board, conditions under which compensation is to be allowed and the extent of compensation for such leave; provided that any leave granted under this section must be approved by the superintendent."

It will be observed from these statutes that the county board may grant professional leave of absence with partial compensation, subject to the following conditions:

- (1) The leave may not exceed one year.
- (2) The leave must have the approval of the trustees of the school district in which the teacher is employed.
- (3) The leave may be granted only to a teacher who has served in the school system of that county for seven or more years.
- (4) The leave must be granted on application of the teacher and must be approved by the county superintendent.

(5) Such leave must be granted under regulations of the county board, which regulations must fix the conditions for granting the leave, allowing the compensation, and the amount of the compensation.

Assuming that these requirements are complied with, your question is answered in the affirmative. Obviously, the regulations of the county board should require an agreement on the part of the teacher granted a leave under such circumstances for return to the county school system for such reasonable length of time as the board might determine.

April 2, 1946.—046-144.

TEACHERS—LEAVE OF ABSENCE

QUESTION: May the county board of public instruction make exchange of a teacher, for a year, with the school system of another state, and if so, may the county board of public instruction pay to the Florida teacher his compensation where the salary of the exchanged teacher from the other state is paid by that other state?

To Honorable Colin English, State Superintendent of Public Instruction:

The only reference in the statutes to exchange of teachers of the public schools appears in the 1943 amendment of Section 231.17, and in that statute the reference to the exchange of such teachers was in connection with the authority there granted to the state board to prescribe regulations under which provisional certificates might be issued to citizens of other friendly nations for the purpose of teaching foreign languages in the Florida public schools. However, in very recent years there have been exchanges of teachers with other states, and I think there is nothing in the statutes which would prohibit such practice.

The exchange may be effected by granting the Florida teacher a professional leave of absence under Section 231.42 of the statutes, which reads as follows:

"Professional leave.—Any member of the instructional staff who finds it necessary to be absent from his duties for professional reasons or is assigned by the county superintendent under regulations of county board to be absent for professional reasons may apply for professional leave during such absence. Such leave may be granted under regulations of the county board. The county board shall also prescribe by regulations subject to any regulations of the State board, conditions under which compensation is to be allowed and the extent of compensation for such leave; provided that any leave granted under this section must be approved by the County superintendent."

Under the foregoing statute the professional leave of absence, when approved by the county superintendent, may be granted the Florida teacher under regulations of the county board, which regulations should also provide for the compensation of the exchanged teacher. Such compensation may be the full amount of the teacher's compensation if the county board's regulations so provide.

It might not be amiss to point out that if the exchanged Florida teacher wishes to continue membership in the teachers' retirement system he should comply with Section 238.05(3) as amended in 1945, and now appearing as Section 238.05(3) (a).

August 28, 1945.—045-270.

ALLOWANCE TO WIDOWS OF TEACHERS RECEIVING PENSIONS

QUESTION: May a widow who was a member of the teachers' retirement system and whose deceased husband had received the pension

provided by Section 231.50, retired because of disability in August, 1941, and who has since that date received a small allowance under the teachers' retirement system, now refund the amount received by her since August, 1941, and be paid the widow's pension provided in Section 231.52, retroactive to August, 1941?

To Honorable Colin English, State Superintendent of Public Instruction:

It appears that this widow's husband was a school teacher and retired prior to the establishment of the teachers' retirement system. He received the \$40.00 per month pension under Section 231.50 until he died on May 1, 1938. The widow was also a teacher and a member of the retirement system, retiring because of disability in August, 1941. From that time she has been receiving an allowance of \$18.78 per month from the teachers' retirement system. She recently requested permission to refund the total amount of allowance received by her since August, 1941, and that she be allowed in lieu thereof the widow's pension provided in Section 231.52. Following an earlier precedent, the state board, on July 30, 1945, agreed, but authorized the pension to begin August 1, 1945. She claims, however, that the pension should be retroactive to August, 1941, when she discontinued teaching.

In an earlier opinion, I held that under facts similar to these, the widow was entitled to elect either to receive the pension provided by Section 231.52 or her allowance under the teachers' retirement system. In another opinion, where a deceased husband who had received the pension provided in Section 231.50 died prior to the enactment of Section 231.52, I held that the widow's pension would begin on the effective date of the latter section, which was June 11, 1941, or, for the purpose of the pension, July 1, 1941.

Section 231.52 gives to the widow of a pensioner under Section 231.50 the same pension as is paid under Section 231.50, so long as she is a widow and resident of Florida, regardless of what her circumstances may be; and so long as we have that statute, she is entitled to it as a matter of right. That section fixes the time from which the pension shall be paid, that is, "from the date of the death of her said husband." She does not claim both the retirement allowance and the pension. It is my opinion that upon the return of the allowances she has received since August, 1941, she is entitled to the pension of \$40.00 per month from August, 1941, to July 1, 1945, and the \$50.00 allowance from July 1, 1945, provided by the 1945 amendment of Section 231.50 (Chapter 22841).

June 10, 1946.—046-250.

EMPLOYMENT OF COACH—ELIGIBILITY

QUESTION: Can the principal of a senior high school legally employ a person who is not certificated to teach in the State of Florida to assist in the coaching of the senior high school football team and pay his salary from the athletic fund, which is raised from revenues of gate receipts at high school football games, without the knowledge or consent of the board of public instruction? Or with the consent of the board of public instruction?

To Honorable Colin English, State Superintendent of Public Instruction:

The principal has no authority to employ any of the school personnel. He may make recommendations for certain employees but all employment is by the school board.

A football coach or assistant football coach should be classed among the instructional staff of the school. Sections 231.14 and 231.15, Florida Statutes of 1941, prohibit the employment of anyone in an instructional capacity as well as certain other personnel named in those sections who does not hold a valid certificate granted or recognized pursuant to law.

and the regulations of the state board of education. Accordingly, it is my opinion that a person who is not certificated as required by law or the rules and regulations of the state board may not be employed as coach or assistant coach.

May 29, 1945.—045-126.

VACANCY IN OFFICE—MEMBER OF COUNTY BOARD

QUESTION: Is there a vacancy in office where the governor makes an appointment to fill a vacancy caused by the resignation of a member of the county board of public instruction prior to the first biennial general election in the four-year term of the officer who resigned, and where no one qualified or was elected at that biennial general election?

To Honorable Millard F. Caldwell, Governor:

In your letter you explain that the officer elected for the four-year term expiring January, 1947, resigned and in May, 1944, the governor appointed a successor to act until the next election. The next election was held in November, 1944, and no one qualified for the office and there was no election to fill the office.

In another case, last summer, a county board member resigned, and the former governor asked the supreme court for an opinion as to whether an appointment to fill the vacancy should be for the remainder of the term or until the next election. The supreme court in an advisory opinion rendered in August, and reported in 19 So. (2d) 198, held that the appointment to fill the vacancy should be for the unexpired term.

The supreme court has held several times that the law fixes the expiration of an appointment regardless of what expiration date might be fixed in the commission. Accordingly, the appointee holds the office until the first Monday in January, 1947, and there is no vacancy in the office.

June 25, 1945.—045-151.

TRUSTEE ELECTED MEMBER OF COUNTY BOARD

QUESTIONS: 1. May a district trustee who has been elected a member of the county board hold both offices?

2. If not, is there a vacancy in the office of trustee.

To Honorable Colin English, State Superintendent of Public Instruction:

As the duties of the office of district trustee are inconsistent with the duties of a member of the county board of public instruction, it is my opinion that both offices may not be lawfully held by the same person at the same time.

The supreme court held, in advisory opinion, reported in 79 So. 874, that a member of the state senate, upon appointment to and acceptance of the office of county solicitor or prosecuting attorney, vacates his right and status as state senator. The same rule would apply to your question, and it is my opinion that if the trustee was elected and accepted office as a member of the board of public instruction, the office of trustee at that time became vacant.

CHILD WELFARE

September 20, 1945.—045-293.

SCHOOLS—AGE REQUIREMENTS AND OPENING DATE

QUESTIONS: 1. In schools having annual promotions, is a child required to be five years and nine months of age on the opening date of

school, or may he be enrolled if he will become five years and nine months of age within the first calendar month after the opening day of the school?

2. Is the opening date of school the date on which members of the instructional staff are assigned to begin their responsibilities or the date upon which pupils are assigned to report to school to begin their work for the year?

To Honorable Colin English, State Superintendent of Public Instruction:

In two opinions, dated September 4, 1940, and September 20, 1940, my predecessor gave a liberal construction to the provisions of the controlling statute, Section 232.01, Florida Statutes, 1941, holding that in schools having annual promotions, a child is entitled to enrollment on the first day of school if he will become five years and nine months of age during the first calendar month of the school year. I concur in those opinions. Answering your second question, I find nothing in the statutes exactly defining the opening date of the school, but Section 227.13 (24), Florida Statutes, 1941, defining the school year, has the effect of making the opening date of school the first day on which the school is "regularly in session." Accordingly, it is my opinion that the opening date of school is the day on which pupils are assigned to report to school to begin their year's work.

December 13, 1945.—045-387.

PUBLIC SCHOOLS—ADMISSION OF PUPILS

QUESTIONS: 1. In some instances children who were below the legal age for admission to schools in Florida have been admitted to schools in other states and apply for admission to schools in Florida when their families come to this state. Is the county board required to admit such children if they have been legally enrolled in the schools in the states from which they have come?

2. Some counties have found that there are children who are seven years or more of age who did not enter during the first month of school. Should such children be admitted even though they did not enroll during the first month?

3. There are a number of instances where children come from other states and apply for admission to schools in Florida for just a short period of time, perhaps two or three weeks. Should such children, provided they are of legal age for school attendance and provided other requirements have been met, be admitted to the schools upon application?

To Honorable Colin English, State Superintendent of Public Instruction:

There is nothing in the Florida Statutes which would authorize admission of a pupil to the public schools solely because the pupil had been admitted to the schools of another state. The fact of admission to the schools of another state should be ignored and the admission requirements of the Florida Statutes only are to be considered. This is in answer to your first question.

Answering your second question,—your attention is directed to Section 232.17 (2) (c) which provides for a notice to the parents of a child of school age who has not enrolled or who is unlawfully absent from school, the notice requiring the enrollment or attendance of the child within three days from the date of the notice. Such nonenrolled or nonattending child must be enrolled and attend within three days regardless of how much of the school year may have elapsed. From this it is clear a child who was of school age within the first month of school and who for any reason was not enrolled during the first month of school should be admitted at any time during the school year.

Section 232.01 requires all children of school age resident in the state to attend school and it is my opinion that such children as are described in your third question should be admitted to the schools, even though their attendance will be for only a short period of time.

September 6, 1946.—046-383.

ADMISSION TO SCHOOL—MINIMUM AGE

QUESTION: A child who was five years of age on January 11, 1946, has completed one year of kindergarten in the Dade county public schools. Prior to that she had two one-half years of kindergarten in private schools. Her parents have now moved to another county and have applied for admission of the child to the first grade in a public school of the latter county. Is she entitled to admission?

To Honorable Colin English, State Superintendent of Public Instruction:

Section 232.01, the controlling statute, fixes the minimum age at which a child may be admitted to the first grade. It authorizes admission of a child who has attained the age of five years and nine months on or before the opening day of school of any year, if the child enrolls within the first month of the school year; but further provides that in schools having semi-annual promotion, a child who has attained the age of five years and eleven months, on or before the opening day of any semester, shall be admitted at the beginning of said semester, or at any time during the first two weeks thereof.

In the papers accompanying your question reference is made not only to Section 232.01, but also to Section 232.04 and Section 232.24. Under Section 232.24 it is argued that having finished a year of kindergarten in the public schools of Dade county the child is entitled to promotion to the first grade, and it is stated that her parents were told that upon completion of one year of kindergarten in Dade county the child would be entitled to admission into the first grade in that county.

Section 232.24 merely directs that when pupils satisfactorily complete the required studies they are to be promoted from one grade to another. That section, in my opinion, would in no manner affect the requirements of Section 232.01, which is the statute governing admission to the first grade. Section 232.04 permits children who will have attained the age of four years by December 1 of any school year to enter kindergarten at the beginning of that school year. Under that statute it would be possible for a child to have completed one year of kindergarten at the age of four years and nine months. It was not the intention of the legislature to thereby reduce the minimum age for admission to the first grade, or to change the limitations of Section 232.01.

In an opinion of September 20, 1945, I concurred in opinions of my predecessor construing Section 232.01. The construction there given was the most liberal which can be placed on the statute. We held that if a child should reach the age of five years and nine months at any time within a full month after the opening of school, it would be entitled to admission.

The school to which application has been made in this case opens September 6th. The child will be five days less than five years and nine months of age October 6th. I find nothing in the statutes cited or elsewhere which would entitle this child to admission to the first grade in the county where now living. While at first glance it may appear hard to refuse admission to a child whose age is within five days of the statutory limitations, it may be pointed out that no matter what age might be fixed by statute, it would create an equal number of similar seeming hardships. A line had to be drawn somewhere; that was done in Section 232.01, and there are no exceptions.

If the school to which application has been made has semi-annual promotions, the child will doubtless be entitled to admission at the beginning of the second semester.

COURSES OF STUDY AND INSTRUCTIONAL AIDS

September 19, 1946.—046-414.

TEXTBOOKS—CONTRACT FOR PURCHASE—PRICE

QUESTIONS: 1. Was the sale of textbooks to Arkansas completed on the contract date or does the act of filling each order for books under the Arkansas contract constitute a sale within the meaning of Section 233.16 (2)?

2. Under the terms of Section 233.16 (2), Statutes of 1941, and of the Florida State Textbook Purchasing Board's contract with the same publisher, would the board be justified in demanding prices for the same books as low as those which have prevailed in the State of Arkansas since July 1, 1944, the effective date of the Arkansas contract?

To Honorable Colin English, State Superintendent of Public Instruction:

In December, 1943, a textbook publisher entered into a written contract with the State of Arkansas to supply certain school textbooks at fixed prices, the contract to be effective July 1, 1944, for a four-year period. In February, 1946, the State of Florida entered into a contract with the same publisher to supply the same books to this state but the prices range from three to six cents higher in the Florida contract. The publisher is supplying these books to the State of Arkansas at the contract price.

The pertinent portion of Section 233.16 (2), Statutes of 1941, reads as follows:

"It shall be stipulated in every contract entered into under the provisions of this chapter between the State Textbook Purchasing Board and any publisher or publishers to whom any contract shall be let under the provisions of this chapter, that if at any time during the life of said contract any book or books therein included shall be sold in any other state at a lower price by said publisher or publishers than is designated in such contract the said lower price shall immediately become the price of such book or books to the State of Florida, and the State Textbook Purchasing Board is hereby authorized and directed at any time said board may find that any such book or books have been sold at a lower price to any state, county, school district, or city in the United States, or to any person, firm, or corporation, to sue upon the bond herein provided for and recover the difference between the contract price and the lower price for which they find the book or books have been sold."

A paragraph to the same effect is in the Florida contract with the publisher.

It was the intention of the legislature in Section 233.16 (2) to insure to the state throughout the period of the Florida contract a price as favorable as might be given to any other purchaser by contract at any time during the term of the Florida contract. It was not intended to require as favorable a price as might have been given another purchaser under a contract of earlier date. A sale, within the meaning of Section 233.16 (2), means the contract, not the delivery of books under the contract. Accordingly, and answering both questions, the current delivery

of books to Arkansas under its 1943 contract are not sales within the meaning of Section 233.16 (2) and the State of Florida would not have the right to demand reduction in prices to meet those of the Arkansas contract under the facts in this case.

SCHOOL PLANT

May 23, 1946.—046-219.

NEW CONSTRUCTION—FORM OF CONTRACT

QUESTION: May a county board of public instruction enter into a contract for the construction of a new building or addition to a present school building on a cost-plus, or a cost-plus fee basis?

To Honorable Colin English, State Superintendent of Public Instruction:

Section 235.31 of the statutes which relates to the awarding of contracts for school buildings and improvements reads, in part:

“ . . . the county board, after advertising the same in the manner prescribed by law, shall award the contract for such building and improvements to the lowest responsible bidder therefor ”

A proviso to that section authorizes projects costing less than \$10,000 to be erected on a day labor basis.

It is my opinion that where the cost will exceed \$10,000, Section 235.31 requires the contract for the construction or improvement of buildings or other projects of the county school system to be for a fixed price, and that the law does not permit the construction of such school buildings or improvements on cost-plus, or cost-plus fee basis.

October 24, 1946.—046-439.

BEER AND WINE—DEFINITION OF LIQUOR—SALE PROHIBITED

QUESTION: Is a place at which beer or beer and wine is sold included in the prohibitions of Section 235.22, Florida Statutes, 1941?

To Honorable James T. Vocelle, Director, State Beverage Department:

Section 235.22, which originated as Section 922 of Chapter 19355, Laws of Florida, 1939, reads:

“No place at which liquors are sold, gambling devices are provided, or other features classed under regulations of the state board as detrimental to the moral or physical welfare of children shall be located nearer than three hundred feet to any school site.”

I have been advised that the State Board of Education has adopted no regulations under said section, and therefore the answer to your question will turn on the proposition of whether the word “liquors,” as employed therein, includes wine and beer.

A consideration of Section 235.22 in the light of Article XIX of the Constitution of the State of Florida, as the same appears in the Constitution of 1885 and as amended at the general elections of 1918 and 1934, together with the pertinent statutes of this state having to do with alcoholic beverages (including the provisions of our present Beverage Law, which was originally enacted as Chapter 16774, Laws of Florida, 1935) and minors, indicates a legislative intent to exclude wine and beer

from the inhibitions of said section. It is my opinion, therefore, that the prohibitions of Section 235.22 do not cover a place at which beer only, or beer and wine only, is sold.

The foregoing is not my belief as to what the law should be but is my conception of the meaning of Section 235.22 when its provisions are interpreted in accordance with accepted rules of statutory construction. We have in our files a memorandum citing the authorities upon which this opinion is based and will be glad for you to examine the same in the event you so desire.

March 11, 1946.—046-95.

SALE OF LIQUORS—DISTANCE

QUESTIONS: 1. Can an incorporated municipality by ordinance permit liquors to be sold in a place located in closer proximity to a school than is provided by Section 235.22, Florida Statutes, 1941, if such municipality has not been given such authority by special act of the legislature passed after the enactment of said section?

2. If an incorporated municipality has not been given the authority by special act of the legislature passed after the enactment of the aforesaid Section 235.22, can such municipality by ordinance provide that the distance from a school to a place where liquors are sold shall "be measured from main entrance of such place of business to main entrance of the school . . . and as the pedestrian walks"?

3. Is the aforesaid Section 235.22 applicable to parochial schools in so far as it relates to the location of places at which liquors are sold?

To Honorable James T. Vocelle, Director, Florida State Beverage Department:

Question Number 1. Section 235.22 provides that:

"No place at which liquors are sold, gambling devices are provided, or other features classed under regulations of the state board as detrimental to the moral or physical welfare of children shall be located nearer than three hundred feet to any school site."

while Section 561.44, Florida Statutes, 1941, the same being a part of the Beverage Law, reads:

"No license under subsections (3), (4), (5), (6), (7) or (8) of Section 561.44 shall be granted to a vendor whose place of business is or shall be within two thousand five hundred feet of an established school or church except in incorporated cities and towns, which said incorporated cities and towns are hereby given the power hereafter to establish zoning ordinances restricting the location wherein such licensees may be permitted to conduct such place of business and no license shall be granted to any such licensee to conduct a place of business in a location where such place of business is prohibited from being operated by such municipal ordinance."

Both of these sections were included in the compilation and revision of the public statutes of the State of Florida of a general and permanent nature and by Chapter 20719, Laws of Florida, 1941 were "adopted and enacted as statute law" of Florida. Such sections were further adopted and enacted as the statute law of Florida by Chapter 22000, Laws of Florida, 1943 and again by Chapter 22858, Laws of Florida, 1945. It follows, then, that such sections are to be considered together so as to give effect to each as far as possible.

Section 235.22 must be construed as a limitation on the rights respecting the location of places at which liquors are sold within an in-

corporated municipality to the extent that a municipality such as that to which you refer can not by ordinance allow liquors to be sold at a place located nearer to a school than is specified in such section. This question, therefore, is answered in the negative.

Question Number 2. Under Section 235.22, no place at which liquors are sold "shall be located nearer than three hundred feet to any school site." (Emphasis supplied).

The applicable conclusions of our Supreme Court in *State ex rel. Fronton Exhibition Co. v. Stein*, 198 So. 82, indicate that in enacting Section 235.22 the legislative intent was that the distance of three hundred feet means three hundred feet measured in a straight line. Consequently, under the section no place where liquors are sold shall be located nearer than three hundred feet, measured in a straight line to any school site.

It is within the knowledge of all that, in conducting a school and especially the lower grades, the school recesses every day to permit the children to have some outdoor recreation which is considered necessary for the health, development and proper education of the child. In this country a "school site" embraces not only the grounds upon which the schoolhouse is situated but also the surrounding grounds used as playgrounds, the grounds surrounding the school building employed as a place of recreation for the children while attending school. See *Board of Education v. Woodworth*, 214 Pac. 1077 (Okla.).

A consideration of what has been set forth in the two next preceding paragraphs discloses that the quoted words in your second question contravene the provisions of Section 235.22 and, as a result, this question must also be answered in the negative.

Question Number 3. It seems clearly to have been intended that Section 235.22 should operate to protect and safeguard pupils attending school from the effects of such evils as may emanate from the places referred to therein. Moreover, the section employs the words "any school site." (Emphasis supplied). When these aspects of the inquiry are developed in conjunction with the meaning of the word "school" as contained in the dictionary, reference works and court decisions, it appears that Section 235.22 does apply to parochial schools in the particular mentioned in your third question; therefore, I am answering this question in the affirmative.

FINANCE AND TAXATION

April 19, 1946.—046-159.

FUNDS—HOW DEPOSITED AND USED

QUESTIONS: 1. In what fund in the state treasury should collections of delinquent taxes, which were assessed pursuant to Section 44, Chapter 18133, Laws of Florida, Acts of 1937, be deposited?

2. In what fund in the state treasury should funds collected for lost, destroyed or damaged school books be deposited?

3. May the above moneys, when deposited in the state treasury, be expended under any existing appropriation or must they be held subject to future appropriations by the State Legislature?

To Honorable J. M. Lee, State Comptroller:

Section 44, Chapter 18133, Laws of Florida, Acts of 1937, provided in part that "for the purpose of creating a special fund to be known as the state textbook fund for the purpose of carrying out the provisions of this

act in respect to furnishing free textbooks as provided herein, there shall be levied and collected upon all assessable property in the State of Florida a tax of three-fourths of one mill upon the dollar." It seems clear from the above quoted provision that the taxes levied were "for the purpose of carrying out the provisions of" said Chapter 18133, as provided in and by said act. The provisions of said Chapter 18133 were substantially reenacted and contained in Sections 701-748, Chapter 19355, Laws of Florida, Acts of 1939, or the school code, which sections were clearly a general revision of the same subject matter. It seems clear that the taxes levied under Section 44 of Chapter 18133 were to be used "for the purchase of textbooks for children in the public schools in the State of Florida" (see Section 236.14, Florida Statutes, 1941), although as provided for in and by said Chapter 18133.

The rule favoring the prospective operation of statutes is applicable to statutes which repeal tax laws. Accordingly it has been held that where such a statute is not expressly made retroactive, a tax assessed before the repeal is collectible afterwards. It will usually be assumed that the legislature intended the taxes to be collected according to the law in force when they were levied. (2 Cooley on Taxation 1181, et seq., Section 538; 61 C. J. 1012, Section 1292.)

Under the statute pursuant to which the taxes were levied they were to be used for the purchase of textbooks for the children in the public schools of the state. Under Section 236.14, Florida Statutes, 1941, funds set aside or appropriated by the legislature for the purchase of textbooks and funds derived "from any other source for such purpose" are a part of the current "state textbook fund." The legislature of 1939, when it adopted the school code (containing a revision and readoption of the free textbook law of 1937), are presumed to have known that it was effecting a repeal of said 1937 law, and that uncollected delinquent taxes would be left on the tax records of the counties which had been levied and assessed pursuant to the said 1937 law. The 1939 school code appears to have been a revision of an existing law and not an entirely new idea of the legislature of 1939.

From the above and foregoing circumstances, I am of the opinion that the 1939 legislature is presumed to have known that delinquent taxes assessed for the purpose of furnishing free textbooks would be left on the tax rolls, by the repeal by implication of the 1937 law, and that it had that fund in mind when it provided that funds derived from any other source for the purchase of textbooks should become a part of that fund. It seems reasonable to assume that the 1939 legislature intended to pass such uncollected delinquent taxes into the current "state textbook fund."

Under the statutes of this state, moneys realized from the sale, loss or damage to textbooks are required to be deposited in the state textbook fund (Sections 233.41, 233.43, 233.47 and 236.14, Florida Statutes, 1941). Under Section 233.48, "all costs and charges, either for books, state courses of study, supplies and equipment, packing, transportation, communication, storage, rent, travel expense, printing, and printed forms, managerial or clerical, or other labor or services, or other expense necessary to effect the purchase, salvage, renovation and repair, accounting for, distribution, or exchange of textbooks, shall be proper charges against the state textbook fund."

From the above and foregoing statutes, constitutional provisions and authorities it appears:

1. That funds in the state treasury which were derived from taxes assessed pursuant to Section 44, Chapter 18133, Laws of Florida, Acts of 1937, were intended by the legislature, when it enacted the school code and by implication repealed the 1937 act, to become a part of the state textbook fund. This purpose is indicated by the provision in Section 236.14, Florida Statutes, 1941, providing for the payment into said fund

of funds accruing "from any other source for" the purpose of purchasing textbooks for the children in the public schools. This answers the first question.

2. Funds collected and paid into the state treasury for lost, destroyed or damaged textbooks, under Sections 233.41, 233.43, 233.46 and 233.47, Florida Statutes, 1941, should be deposited in the state textbook fund. These funds appear to become a part of the current state textbook fund. This answers the second question.

3. Section 236.14, Florida Statutes, 1941, sets up the state textbook fund and provides that funds shall be paid into it and the sources from which it derives its resources. Section 233.48, Florida Statutes, 1941, appropriates and determines the expenditures to be made from the said fund. This section not only appropriates the funds provided by the biennial appropriation bills but also the funds derived from payments for the sale, loss or damage of textbooks and the funds derived from any other source for the purchase of textbooks. These funds may be expended under said Section 233.48. This answers the third question.

August 24, 1945.—045-259.

SCHOOL DISTRICT ELECTIONS—QUALIFIED ELECTORS

QUESTIONS: 1. Who is qualified to vote in a school district election?

2. Is a person who does not pay a tax on real or personal property but who owns a homestead which is exempt from tax, and who is otherwise qualified to vote, entitled to vote in a school district election?

To Honorable L. R. McCallum, County Superintendent of Public Instruction, Mayo, Florida:

I presume you refer to the regular biennial school district election and what is said herein is confined to such election.

Under date of August 18, I wrote an opinion which answers your first question. A copy of same is enclosed herewith.

My predecessor, in an opinion dated August 31, 1939, held that such a person as described in your second question is not entitled to vote in a school district election. I concur in that opinion until such time as Section 236.32 (2) (d) may be declared invalid by the court. The rule would be different where the district votes on the issuance of school district bonds.

December 7, 1945.—045-379.

ELECTIONS—PROCEDURE IN EVENT OF TIE VOTE

QUESTIONS: 1. At the regular biennial school election held on November 6, 1945, in Lake county, Florida, tie votes occurred with respect to certain candidates for trustees in Special Tax School Districts numbered 5 and 14 under these circumstances: in District No. 5 the four leading candidates received the following respective votes; 19 votes, 18 votes, 15 votes, 15 votes; in District No. 14 the leading candidate received 12 votes and the next three received 11 votes each. Is it the duty of the governor under Paragraph (e), Section 1032, Article 5 of Chapter X, Florida School Code (being Section 236.32 (1) (e), Florida Statutes, 1941), or under any other provision of law to call special elections with respect to the offices involved in said tie votes?

2. Under the factual situation set forth in the preceding question, is the legal aspect of the problem therein expressed with respect to District No. 14 changed by the announcement of one of the candidates who received 11 votes that he has withdrawn his name as a candidate?

To Honorable Millard F. Caldwell, Governor:

Under the situation reflected in question (1) above it is apparent that in District No. 5 two of the three trustees were elected and that in District No. 14 only one of the three was elected.

Section 236.32 (1) (e), referred to in the inquiry, is not applicable, since it is a part of the law pertaining to the organizing of a special tax school district. However, it is noted that the wording of the first sentence of said subsection is found in Section 236.32 (2) (a), Florida Statutes, 1941, such latter subsection being a part of the law applicable to regular biennial school district elections.

Section 236.32 (2) (f) provides that the three persons receiving the highest number of votes cast on the ballot for the election of trustees shall serve for the ensuing two years as trustees of the district.

The wording of the above mentioned Section 236.32 (2) (a) appears to be broad enough to include a special election, in the event of a tie vote, as contemplated by the general election laws in Section 99.48, Florida Statutes, 1941, since the school code appears to be otherwise silent upon the subject. The conclusion thus reached is in harmony with the conclusion found in an opinion of this office on this subject dated November 15, 1943, (Biennial Report of Attorney General, 1943-1944, page 259).

The said election held on November 6, 1945, in District No. 14 was not a primary election but a general election. A canvass of the votes indicated that because of the three-way tie noted there was no election of trustees for two of the three offices to be filled. A tie-vote in a primary election and withdrawal of one of the candidates so involved presents a different situation to a tie-vote in a general election.

In view of the foregoing, it appears the above questions properly are answered in their numbered order as follows:

(1) It would seem that the governor properly should call special elections for the purposes of permitting the duly qualified electors in such respective districts to elect one trustee in said District No. 5 and two trustees in said District No. 14. The applicable law for such special elections is found in Sections 99.48 and 98.08-98.10, Florida Statutes, 1941.

2. The announced withdrawal of one of the candidates who received 11 votes in District No. 14 does not alter the requirement for a special election to fill two of the offices of school trustee in said district.

Attached find copy of proposed order of the governor with respect to such elections as provided by said Section 98.10. You will note that the date for such election is left blank and should be filled in by you. In supplying the date, the time element of not less than fifteen nor more than forty days set forth in said Section 98.10 is called to your attention, and it is suggested that consideration be given to the preparations required of the school officials of Lake county for the holding of such elections.

February 19, 1946.—046-75.

MILLAGE ELECTION—MAJORITY OF VOTES

QUESTION: Where the trustees made no recommendation, but the county board recommended a one-mill levy for a tax school district in which there are between fifty and sixty qualified electors, and at the biennial election only four electors participated and only two of the four voted on the millage, both voting for a three-mill levy, what is to be considered the tax levy for the ensuing biennium?

To Honorable Colin English, State Superintendent of Public Instruction:

Section 10 of Article XII of the Constitution reads in part as follows:

"The Legislature may provide for . . . the levying and collection of a district school tax, for the exclusive use of the public free schools within the district whenever a majority of the qualified electors thereof that pay a tax on real or personal property shall vote in favor of such levy . . ."

Section 236.32 (2) (f) of the statutes reads in part as follows:

"The tax levy receiving the **majority of all votes for tax levies cast by qualified electors**, or, in case no one levy receives a majority, that levy for which, together with the votes cast for higher levies, a majority of the votes are cast, shall become the levy for the district for the next ensuing two years . . ."

The question involves determination of (1), whether the constitution requires the affirmative vote of a majority of all electors qualified to vote in the district election, and (2), if not, whether the quoted constitutional provision requires a majority of those voting on any matter at the election, or a majority of only those voting on the measure; the measure, in this case, being the district millage.

In *Pickett vs. Russell*, 28 So. 764, our supreme court held that Section 10 of Article XII of the constitution does not require a majority of all qualified electors of the district, but only a majority of those voting. It was not decided in that case whether the Constitution required a majority of those voting on any question at the election or a majority of only those voting on the millage.

Section 236.32 (2) (f) quoted above is quite clear, and, under that Section, a majority of only those voting on the millage is required; the question is, whether or not it is in conflict with Section 10 of Article XII.

Section 6 of Article IX of the constitution authorizes the issue of bonds only after the same have been approved by a majority of the votes cast in an election in which a majority of the qualified freeholders shall participate. That provision of the constitution does not directly apply to our question because it relates to bonds, whereas our question involves district millage.

A few weeks since, in *State vs. City of Miami Beach* 23 So. (2) 720, our court construed Section 6 of Article IX. In that case there were submitted to the voters four separate and distinct bond issues and two other questions, all on the same ballot. More than a majority of the qualified electors participated in the election, but the total "for" and "against" votes on each of the proposed bond issues were a few less than a majority of the total qualified electors. Summarizing other decisions on the same question, the court held that, "a voter, qualified to cast a ballot for bond proposals and for candidates in a simultaneous election, by indicating a choice only of candidates signifies an intention not to participate in the election with reference to bonds," and that, therefore, none of the bond issues were authorized. The court interpreted that constitutional provision to mean that a majority is determined by reference to the total of votes cast for or against each measure. While Section 6, Article IX, does not apply to a vote on district millage, the reasoning in the last cited case is applicable, and it is my opinion that Section 236.32 (2) (f) is not in conflict with Section 10 of Article XII of the Constitution.

I conclude, therefore, that on the question of millage in a tax school district biennial election, a majority is to be determined by reference to the total number of votes cast for district millage and not the total number of votes cast at the election. In this case there were only two votes for for millage, both being for three mills, and those two votes being the only votes cast on the measure, the millage for the ensuing biennium is three mills.

December 20, 1945.—045-392.

SCHOOL DISTRICTS—ELECTIONS—UNQUALIFIED VOTERS

QUESTION: In a biennial school district election, in addition to election of the trustees and approval of three mills proposed for the support and maintenance of the schools, there was submitted a proposal of additional millage for the building reserve fund. In one of the precincts twenty unqualified persons were permitted to vote. The majorities for the trustees and the three mills for support and maintenance were so great that the result was in nowise affected by the vote of the unqualified voters, but the district vote for the additional millage proposed for the building reserve fund resulted in a tie vote. Does the fact that twenty unqualified persons voted invalidate the whole election, and if not what are the results of the election?

To Honorable Colin English, State Superintendent of Public Instruction:

The court has held that the reception of illegal votes at an election does not affect its validity, unless it is shown that they were in such numbers as to affect the result. See *State v. Rinehart*, 192 So. 819. It would be impossible to determine in this case how the unqualified voters may have voted on any of the questions submitted on the ballot. It is my opinion that the election was valid; the trustees were elected, and the millage for support and maintenance was fixed. The proposal for the additional millage for the building reserve fund required a majority. As the voting on that question was a tie vote, the proposal failed to receive a majority and therefore was rejected.

January 24, 1946.—046-35.

SCHOOL DISTRICT ELECTION—QUALIFIED VOTER LIST

QUESTION: Which county official may be required to furnish a list of those qualified to vote in a school district bond election?

To Honorable John R. Jones, Tax Collector, Escambia County, Pensacola, Florida:

In Section 236.32 (1) (e), in connection with elections for the organization of school districts, is found the provision that the supervisor of registration of any county shall furnish, upon payment of such service, to the county board, on demand, a certified list of the qualified voters residing in a school district or territory to be created into a school district that have paid a tax on personal or real property for the year next preceding any such special tax election. It appears that such provision could not be construed to apply also to bond elections in such district; nor is it apparent there is any other provision in the school laws specifically providing for the furnishing of such list by the Supervisor of Registration.

Attention, however, is directed to Chapter 103, Florida Statutes, 1941, entitled "Bond Elections." This is original Chapter 14715, Laws of Florida, Acts of 1941. Section 103.06, Florida Statutes, 1941 provides that the "governing authority" of any district in which there is intended to be held a bond election, shall cause to be made up and certified by the "proper registration officer" having charge of the registration books for said election, list of the names of all qualified electors appearing thereon who are determined to be freeholders in such district, and who are also determined to be qualified to vote in such election; and that a certified copy of such list of qualified electors who are freeholders residing in such district shall be furnished to the inspectors and clerks of the election at every voting place.

Prior to the adoption of the above provisions of our school laws relating to school district bond elections, our court held in *State vs.*

Barker (Fla.), 168 So. 534, that the provisions of said Chapter 103 could be followed for the calling of elections to authorize the issuance of special tax school district bonds. Without considering the question, it may be that by the adoption of our above school laws respecting the holding of district bond elections, the provisions of Chapter 103 which may be inconsistent therewith, as related to such elections, were repealed. However, it does not appear that said Section 103.06 is in conflict with any of such school laws and that it is applicable to school district bond elections.

In view of the foregoing, it appears the answer to the above question properly is answered as follows:

The board of public instruction of the county in which a school district bond election is to be held properly should call upon the county supervisor of registration to make up and certify a list of names of qualified electors who are determined to be freeholders residing in such district; and a certified copy of such list is required to be furnished to the inspectors and clerk of such election at each voting place where the election is to be held, all in pursuance of said Section 103.06. A copy of such certified list is required to be filed and preserved among the records of said school board as required by Section 103.07, Florida Statutes, 1941.

December 18, 1945.—045-399.

INSTRUCTIONAL UNITS—ALLOTMENT

QUESTION: Would the county board be entitled to additional instructional units if, in addition to the circumstances described in my opinion of October 22, 1945, involving this same question, the county board pays the salaries of the teachers, supervises them, and administers in the same manner that they employ, supervise, and administer teachers in their regular public high schools?

To Honorable Colin English, State Superintendent of Public Instruction:

I think my opinion of October 22 was quite clear. In that opinion I said "I understand from your letter that the administration of the school is actually in the hands of the private school and not in the county board." If that is correct the administration of the teachers as set up in your question quoted above would not entitle the school to the additional instructional units. If, however, the school board also actually operates the school with the same control and administration as it does in any other kind of a district school, they would be entitled to the additional instructional units.

May 22, 1945.—045-121.

SCHOOL DISTRICTS—REORGANIZATION

QUESTION: What would be the effect of an election held under Section 236.59, Florida Statutes, 1941, to provide for the organization of more adequate school districts where the voters in one or more of the proposed new district areas voted in favor of the change and the electors in one or more of the proposed new district areas voted against the change? More specifically, does the adverse vote in one or more of the proposed new district areas prevent the favorable votes in the other proposed district areas from becoming effective?

To Honorable Colin English, State Superintendent of Public Instruction:

I am assuming that the question contemplates a situation where one district is to be broken up into two or more parts and each part combined with a contiguous district.

Section 236.59 (14) reads in part:

"If the majority of the votes cast in the election in the entire area included in any proposed new district are opposed to the organization of the new district, then the original districts in that area shall be continued during the ensuing biennium . . ."

It will be observed that the statute states specifically what shall happen in that part of the district intended to be divided where the vote is adverse; to wit, that part shall continue as it was before. No reference is made to what happens in other parts of the district where the vote was favorable. It is my conclusion that the vote in each area controls and where there is a favorable vote in any of the proposed areas, the part included in the district to be divided becomes a part of the new proposed district. This could result in a part of the district to be divided being joined to a contiguous district and another part being left as it was. I think that is the intent of the statute.

A somewhat similar situation arises under Section 236.32 (4) (1), relating to reorganization of districts. That subsection provides that all districts in the territory proposed as a new school district which vote in favor of the reorganization of the new district shall become one entire district, etc.

The somewhat difficult situation and the possible results make it necessary for the county board, and the state superintendent when the matter is submitted to him, to carefully consider the possible results so that they may not be worse than the situation which they wish to correct.

April 5, 1946.—046-138.

BOND ELECTION—INITIATING PETITION

QUESTION: In a special tax school district, which is not located wholly or partially in a city of 25,000 population, or more, according to the last federal census, may a petition by residents of the district for tax school district bonds be dispensed with if the county board initiates the proposal for bond issue?

To Honorable Colin English, State Superintendent of Public Instruction:

It is implied in Section 236.36 that a district bond issue should be initiated only by petition of tax school district residents, except in those cases mentioned in the proviso. On the other hand it is strongly implied in Section 236.37, as amended, that the county board may initiate the proposal. In any event the county board has the authority under Section 103.02 as the governing authority of the tax school district. See *Evans vs. Barker*, 168 So. 534. Construing all of these statutes leads to the following results:

(a) Trustees may initiate the proposal only when the tax school district is located wholly or partially in a city of 25,000 population, or more, according to the last federal census, and

(b) In all other cases the proposal may be initiated either by the county board or by petition.

Your question is answered in the affirmative.

April 23, 1946.—046-168.

PETITION FOR BONDS—USE

QUESTION: Where a resolution of the county board and certain other proceedings based upon the petition of a sufficient number of qualified electors of a tax school district for issuance of bonds were held

to be illegal, and where there has been no substantial delay thereafter, may the county board use the original petition as the basis of a resolution for the issuance of bonds in a smaller amount, or is another petition necessary?

To Honorable Colin English, State Superintendent of Public Instruction:

It appears that a petition for the issuance of bonds for the construction of a school was signed by a sufficient number of qualified electors in compliance with Section 236.36, but subsequent action based upon that petition was found to be illegal. Thereupon the county board, without any substantial delay, endeavored to determine what amount of bonds for the designated purpose might be approved and otherwise diligently planned to carry out the project. They now wish to start over using the petition originally filed as the basis for the issuance of bonds in a smaller amount.

The county board has the authority under Section 236.37 to determine by their resolution the amount of bonds required for the designated purpose regardless of the amount stated in the petition, and there having been no substantial delay, it is my opinion they may now act on the original petition, proposing the newly determined and smaller amount of bonds.

The words in Section 236.37 "at its first meeting after the receipt of any petition" are directory only and are not to be construed as limiting the power of the county board to act only at its first meeting after the receipt of the petition.

I call your attention to an opinion which I gave you on April 5 in which I discussed the manner in which a bond issue may be initiated. In that opinion I stated that trustees may initiate the proposal when the tax school district is located wholly or partially in a city of 25,000 population or more, according to the last federal census; and that in all cases the proposal may be initiated either by the county board or by petition.

January 18, 1946.—046-19.

PREREQUISITES FOR SCHOOL DISTRICT BOND ELECTION

QUESTION: Where the statutes set up certain prerequisites for an election by freeholders to determine whether or not tax school district bonds should be issued, would the bonds be valid if such requirements were complied with after instead of before the election?

To Honorable Colin English, State Superintendent of Public Instruction:

You have submitted copies of two resolutions of the Board of Public Instruction of Hillsborough county, adopted on November 8, 1945, for the issuing of bonds in the amount of \$250,000.00 of Special Tax School District No. 50. It appears that the school board without complying with some of the important preliminary procedure required by the 1943 amendments of the pertinent sections of the statutes relating to the issuing of tax school district bonds, held an election of the freeholders of the district.

The 1943 amendments of Sections 236.37 and 236.45 made material and important changes in the procedure for issuing tax school district bonds.

One of the duties of the school board is to plan a long range program as to financing, school buildings and other projects. Some counties are still suffering from extravagances and unwise expenditure due to over-optimism and lack of information and foresight during former periods of prosperity. There is no surplus of school money in any county and it is of the utmost importance that every dollar of school money be wisely

and carefully spent, and that the issuance of bonds should not only be limited to essential present purposes, but should also be consistent with the long range program and likely future needs. Much has been learned from past experience as to what is and what is not a sound, economical and efficient program in such matters. There is available to the state superintendent much valuable information on these matters. It was the intention of the legislature by the amendments of 1943 to prevent repetition of former extravagances, wastes and poor planning, and to protect the present taxpayer as well as those who will later carry the burden of present expenditures.

Among other things, the 1943 amendments required the board to determine whether, in its opinion, the projects for which the bonds are proposed to be issued are essential for the school program of the county; they require that a resolution setting forth the proposals and the plan for financing the projects together with information prescribed by the State Board of Education be submitted to the state superintendent for his approval; they require that such bonds be retired within twenty years from date of issuance unless a longer period is necessary and has been specifically approved by the State Board of Education. None of these things were complied with by the board, and the question is whether the county board may now, after a premature election, comply with those or other omitted requirements in lieu of their performance prior to the election so as to make the election valid.

The general rule is that such statutory preliminary requirements in so far as essential and mandatory, must be observed in substance, especially in regard to conditions precedent. Similar procedural matters leading up to the issuing of the bonds were considered by our court in *City of Fort Myers v. State*, 117 So. 97, *Board of Public Instruction of Brevard County v. Raymond*, 7 So. 2d 99, *Grantham v. Board of Public Instruction of DeSoto county*, 82 So. 52, and were there held to be mandatory.

In view of the fact that the amended statutes set up in logical sequence these important procedural steps to be taken before an election is called, and as they appear to be mandatory, it is my opinion that after an election has been called and held, compliance with such omitted mandatory requirements would not have the effect of validating the premature election.

I suggest that you forward to the county board one of the mimeographed copies of the preliminary resolution which I prepared for you about a year ago as a form to be followed under the 1943 amendments. The papers which you sent to me are returned herewith.

July 30, 1946.—046-327.

SCHOOL DISTRICT BONDS—METHOD OF VALIDATION

QUESTION: Are the provisions of Section 236.48 of the Statutes of 1941, as amended by Section 10 of Chapter 21989, Laws of 1943, applicable to school district bonds voted in January, 1942, where the bonds have never been printed, offered for sale, validated or actually issued?

To Honorable Colin English, State Superintendent of Public Instruction:

At the time the bonds were voted Section 236.48 merely provided that school tax district bonds which were authorized under Chapter 236 of the statutes should be subject to validation in the manner provided for in Chapter 75 of the statutes. In 1943, Chapter 21989 added a provision to the effect that in lieu of validation under Chapter 75 the county board might submit all necessary information to the attorney general and

the latter's approving opinion should be "sufficient evidence that the bonds are valid." Chapter 21989 added another provision to the effect that certain recitals in the bonds should be conclusive of certain statutory requirements under named conditions.

The additional matter included in Section 236.48 by the Act of 1943 would, in my opinion, be applicable to bonds described in your question.

Presumably, the ultimate purpose of your question is whether these bonds may be validated within the meaning of the section by the approving opinion of the attorney general. More than four years have elapsed since these bonds were voted. Why they were not issued before this time is not stated. Ordinarily bonds should be issued within a reasonable length of time after they have been formally authorized. The validity of the bonds might be affected by unreasonable delay in issuance and whether or not issuance at this time, more than four years after their authorization, is within a reasonable time is a question of fact. Such question should be determined in the jurisdiction issuing the bonds, where reasons for the long delay may be readily and fully heard, and by a court whose judicial determination of such question of fact would have a binding force and effect. For these reasons, it is my opinion that the bonds in this case should be validated in the matter set out in Chapter 75 of the statutes.

August 7, 1945.—045-227.

BONDS—CALL DATE

QUESTION: What is the construction of the following sentence in Section 236.45, Florida Statutes, 1941, as amended?

"All bonds issued hereunder which bear interest in excess of two and ninety-nine one-hundredths per cent shall be callable on terms prescribed by the county board beginning not later than ten years from the date of issuance."

To Honorable Colin English, State Superintendent of Public Instruction:

You state the meaning which you have given that provision and inquire whether it is correct. I think the sentence has a quite different meaning. A call date is permissible, but not mandatory, in cases where the total issue matures in ten years or less.

If the bonds bear interest in excess of 2.99 per cent and some of them mature later than ten years from date of issuance, Section 236.45 is mandatory and means that the county board must provide in the bond the terms under which the bonds are callable, and those terms must include a call date, which may be any date not later than ten years from date of bonds. Obviously, the sentence would have no effect on those bonds of the issue maturing prior to the call date fixed by the board. It would apply to all bonds maturing after such date. Such a provision usually reads like this: "The said special tax school district hereby reserves the right to call and redeem such of this issue of bonds as mature after the day of, 19....., on said last mentioned date or any interest payment date thereafter," etc. The statute quoted above simply means that the date to be inserted may not be later than ten years from date of issuance. It may be any earlier date.

FINANCIAL ACCOUNTS AND EXPENDITURES

May 1, 1946.—046-183.

DEBT OF DIVIDED COUNTY

QUESTION: Where a new county was created from a part of another county in 1925 and the amount of the school debt of the parent county to be assumed by the new county was duly determined in the manner

required by statute, but the debt never paid, may the county board of public instruction of the new county now proceed under Section 237.28 of the Statutes of 1941 to issue interest coupon warrants for the purpose of liquidating the debt to the parent county?

To Honorable Colin English, State Superintendent of Public Instruction:

The indebtedness involved has been in litigation between the two counties. See Board of Public Instruction of Gilchrist County v. Board of Public Instruction of Alachua County, 19 So. (2d) 576 and Rogers v. Board of Public Instruction of Alachua County, 23 So. (2d) 154. The debtor county now proposes to raise part of the funds necessary to satisfy the writ issued against it in the above case by issuance of interest coupon warrants in the amount of \$45,000.00, all maturing within five years, and following the procedure set up in Section 237.28. That section authorizes issuance of warrants for funding certain debts. It was held in the case of State Bank of Bowling Green v. Board of Public Instruction for Hardee County, 156 So. 319, that Section 237.28 covered such indebtedness as this. It is my opinion that the county board may liquidate the debt, or any part of it, in the manner set out in Section 237.28.

July 31, 1945.—045-208.

SCHOOL FUNDS—USE FOR CITY AND COUNTY WELFARE

QUESTION: May the county board of public instruction of Sarasota county lawfully participate in the financing of the Sarasota city and county welfare board?

To Honorable Colin English, State Superintendent of Public Instruction:

Accompanying your letter is a copy of the resolution under which the welfare board was organized and from which it appears that the board of public instruction of that county is one of the governmental units participating in the city and county welfare board, and also that the purposes and objects of the welfare board cover the following fields: "Juvenile delinquency, mothers' aid, school attendance, aid to the indigent and out-cast, medical aid and hospitalization for the impoverished and unfortunate, and temporary relief to those who may have a just call upon society because of their distress."

If it is the purpose of the question to inquire whether county or district school funds may be used for, or contributed to, such organization, the answer is that such funds may not be so used.

August 7, 1945.—045-225.

TEACHERS' SALARY FUND WARRANTS—TWO FORMS

QUESTION: The two forms of teachers' salary fund warrants (for payment of teachers' salaries and for payment of transportation expenses) heretofore used, have the following notation on each: "This warrant is drawn for the purpose stated, and none other, and is in full compliance with all provisions and requirements of law, including Chapter 19355, Laws of Florida, Acts of 1939, as amended by Chapter 20970, Laws of Florida, Acts 1941." What change, if any, should be made with respect to such notation or warrants for use during the present fiscal year?

To Honorable J. Edwin Larson, State Treasurer:

Chapter 19355, Laws of Florida, Acts of 1939, provides that the act, as amended from time to time, should be known as the Florida School Code. This chapter, as amended by Chapter 20970, Acts of 1941, is found in Florida Statutes, 1941 as Chapters 227-237 thereof, Section 227.02 providing that said numbered chapters, including any amendments thereto, should be known as the Florida School Code. The school code was amended in several respects in 1943 and 1945.

the following: "This warrant shall become void if not presented for payment within six months from date hereof."

June 26, 1945.—045-156.

CONFLICT BETWEEN LOCAL LAW AND SCHOOL CODE

QUESTION: Is the budget of the school board of Orange County required to be submitted by May 1 or by July 15?

To Honorable Colin English, State Superintendent of Public Instruction:

Chapter 18746, Special Acts of 1937, establishing the county budget commission in Orange county, required submission of budgets by all county boards, including the school board, to the commission by May 1 of each year.

Section 237.22, Florida Statutes, 1941, provides that in counties having a county budget commission, school budgets are to be submitted as early as possible before July 15.

Section 237.22 is a part of Chapter 19355, Laws of 1939, known as the Florida School Code. Section 106 of Chapter 19355, which is not carried forward into the Statutes of 1941, repealed "all laws, parts of laws, general, special, and local, (with certain exceptions not applicable here) . . . which are in conflict with the provisions of the Florida School Code." The two dates are definitely in conflict. It is my opinion, therefore, that Section 237.22 is controlling, and the budget is to be submitted "as early as possible before July 15."

RETIREMENT SYSTEM FOR TEACHERS

February 13, 1945.—045-39.

MEMBERSHIP SERVICE CREDIT—REDEFINITION OF "TEACHER"

QUESTION: Is a member of the retirement system who was over 60 years of age on July 1, 1939 and who became a member of the retirement system under the 1941 amendment to the retirement act, eligible for membership service credit for the school years 1939-1940 and 1940-1941, if such a member does not pay the contributions for the two years in question?

To the Teachers' Retirement System:

The original act passed in 1939 restricted membership to "a teacher or principal in the public free schools." By amendment to Sections 238.06(1) and 238.01(4), Florida Statutes, 1941, membership eligibility was granted to any member of the teaching or professional staff of the several institutions of higher learning, State Department of Education employees, and certain County Superintendents. The pertinent portion of Section 238.06(1), as amended, is as follows:

" . . . provided, that persons not eligible to membership in the retirement system as of July 1, 1939 and (are) now eligible to membership, shall file with the board of trustees an application and shall meet all other requirements prescribed above; and, provided further, that all such persons shall be entitled to prior service credit for the year(s) prior to July 1, 1939, as prescribed in subsection 3 below; and, provided, further that persons made eligible to membership in the retirement system by provisions of this law may elect:

"(a) To make no contributions for the school years 1939-1940 and 1940-1941; and, if they so elect, shall be entitled to no membership service credit for those years.

"(b) To make contributions to the retirement system on or before December 1, 1941, for the two years 1939-1940 and 1940-1941 at the prescribed rate on the basis of their salary for those years; and, if such contributions are made, shall be entitled to membership service credit for those two years."

Section 238.09(1) (b), relating to deductions from members' salaries of contributions toward the purchase of annuities, contains the following provision:

"... But the employer shall not make any deduction for annuity purposes from the compensation of a member who has attained the age of sixty years, if such member elects not to contribute."

Thus we have a conflict between Sections 238.06(1) (a), as amended, and 238.09(1) (b), and the question is not free of doubt; but after consideration of the whole design, theory, and purpose of the retirement act, the pension part of the benefits, and the annuity features of the program, I am of the opinion that the age-of-sixty exemption clause in Section 238.09(1) (b) should be read into Section 238.06(1) (a) as a proviso thereto, and, as thus construed, it would read:

"To make no contributions for the school years 1939-1940 and 1940-1941; and if they so elect shall be entitled to no membership service credit for those years, unless they had reached the age of sixty prior to eligibility for membership."

I think this construction gives the actual legislative intent, and your question is answered in the affirmative.

September 29, 1945.—045-302.

WARRANTS DRAWN ON STATE TEACHERS' SALARY FUND

QUESTION: With respect to which of its employees, if any, may a county board of public instruction properly issue warrants drawn upon the state teachers' salary fund and payable to the county officers' and employees' retirement fund, representing the five per cent salary deductions required by Section 3, Chapter 22938, Acts of 1945?

To Honorable J. Edwin Larson, State Treasurer:

Section 2(1), Chapter 22938, Laws of Florida, Acts of 1945 (County Officers and Employees Retirement Act), provides that "officers and employees" covered by the act shall include full time officers and employees, except day laborers and except such officers and employees as are excepted from the provisions of said act in Sections 16 and 17 thereof.

Section 16 provides the act shall not apply to certain named officers, including "members of the teachers' retirement system of the State of Florida." Section 17 provides, among other things, that the act shall not operate to repeal certain sections of Florida Statutes, 1941, including Sections 238.01-238.16 (teachers' retirement system), "nor to affect the rights of any person enjoying the benefits or entitled to enjoy the benefits of such sections or acts."

Those who may be paid out of the instructional portion of the state teachers' salary fund are "instructional personnel" who are "properly certified" (Section 236.13, Florida Statutes, 1941). The definition of "instructional personnel" is found in Section 227.13, Florida Statutes, 1941. It appears that all those who may be paid from the instructional portion of the state teachers' salary fund are either (1) members of the teachers' retirement system, (2) have elected not to become members, or (3) may become members in the manner set forth in Section 238.05, Florida Statutes, 1941, as amended (including those who hitherto elected not to become members). It would seem therefore, that whether such persons are members of said retirement system or not, they are entitled to "enjoy the

benefits" of such system, within the meaning of Section 17 of said Chapter 22938. It does not appear that it was the legislative intent to afford a particular class of county employees two distinct retirement systems from which to elect the one of their choice. Therefore, those who may become members of the teachers' retirement system are excluded from the benefits of said Chapter 22938.

In view of the foregoing, in my opinion the above question properly is answered as follows:

The only persons entitled to payment of all or a part of their salaries out of the state teachers' salary fund and who are eligible for the benefits of the county officers and employees' retirement fund are school bus drivers and employees of county school boards maintaining transportation equipment, provided such persons are "full time" employees within the meaning of Section 2(1) of said Chapter 22938. Granted such persons are "full time" employees, a county school board properly may issue warrants upon the state teachers' salary fund payable to the county officers and employees' retirement fund covering the five per cent deduction (see Section 3, Chapter 22938) of that part of such respective persons' salaries payable out of the state teachers' salary fund, provided such persons have not made a contrary election or do not make such.

January 22, 1946.—046-52.

EARNABLE COMPENSATION—CONTRIBUTIONS

QUESTIONS: 1. If a member of the teachers' retirement system who intends to remain in service wishes to obtain the benefits of the redefinition of "earnable compensation" given in Section 238.01 (14), as amended in 1945, is it necessary for him to make contributions in an amount equivalent to the difference between the amount he would have contributed had the provisions of Section 238.01 (14), as amended in 1945, been in effect July 1, 1939?

2. Where a member of the teachers' retirement system became eligible for retirement after July 1, 1945, the effective date of Chapter 22693, and who now wishes to retire and to obtain the benefits of the redefinition of "earnable compensation" given in Section 238.01 (14), as amended in 1945, is it necessary for him to make the contributions mentioned in the preceding question?

3. If the foregoing question is answered in the affirmative, when is a member in such situation required to make the additional contributions?

4. Is a teacher who had retired prior to July 1, 1945, the effective date of Chapter 22693, entitled to the benefits of the 1945 redefinition of "earnable compensation," Section 238.01 (14), without making any additional contributions?

5. If the foregoing question is answered in the affirmative, to what extent would his allowance be increased?

6. If a member of the teachers' retirement system elects to retire at the age of 55 upon the basis of either 30 or 35 years of service as authorized by Section 238.07 (2) and (3), 1945 amendment, what additional contributions, if any, must he make?

(a) If he does not elect to make the contributions made optional by the 1945 amendment of Section 238.06 (2)?

(b) If he elects to make such contributions?

To Honorable Bryan Willis, State Auditor, and Actuary, Teachers' Retirement System:

The 1945 Amendment of Section 238.01 (14) in redefining "earnable compensation" increased from \$1,500.00 to \$3,000.00 the maximum amount on which a teacher's compensation could be computed for retire-

ment purposes. This increase presents certain problems in construing and applying other sections of the Retirement Act (a), the teachers who had retired prior to July 1, 1945, (b), the members who have become eligible since July 1, 1945, and have applied for retirement, and (c), the members who will continue in service. The amendments, by the addition of a few simple words, might have removed all doubt as to the legislative intention on all of the questions, but those words are absent. I have carefully considered the theory on which the retirement system is founded, its purposes, its basic method of financing the allowances, the language used in the amendments, as well as the practical application of the amendments from the actuarial and accounting viewpoint. It has been necessary to give weight to all of those matters, and having done so, the intention of the Legislature seems clear.

Most of the questions submitted involve a construction of sub-paragraph 2 of Section 238.06 of the 1945 Amendment, which is new matter inserted into the section. A controversy has arisen as to its meaning and application. It reads as follows:

"Any member of the retirement system may elect to contribute to the retirement system an amount which shall be equivalent to the difference between the amount such member has contributed and the amount he would have contributed had the provisions of Section 238.01 (14) as amended by this Act been in effect July 1, 1939; provided that such election must be made and the amount paid into the retirement system on or before July 1, 1947?"

The retirement allowance is made up of three items: (a) an annuity which represents the teacher's contributions by way of deductions from his salary; (b) a membership service credit pension which is paid by the state and is the exact amount of (a), that is, by the membership service credit the State matches the teacher's contributions dollar for dollar, and (c) a prior service credit which is an additional pension contributed by the state.

On the one hand, it is contended that the latest redefinition of "earnable compensation" entitles a member of the system to have his average final compensation computed on the basis of his actual salary up to \$3,000.00 without making additional contributions in an amount which would be the equivalent of the difference between the amount such member has contributed and the amount he would have contributed had the provisions of Section 238.01 (14), as amended in 1945, been in effect July 1, 1939. On the other hand, it is argued that in order to obtain the benefits of the increased maximum "earnable compensation" he must make such contributions.

In support of the liberal view it is argued that the 1945 legislature showed great liberality in the matter of pensions for public employees and that it was intended to give the teachers a larger contribution from state funds without requiring anything further from the teacher; and that furthermore, whether or not he makes such additional contributions, is of no great concern to the state because if he does make such additional contributions, his allowance would only be increased by that amount, in other words, that such additional contributions to his annuity would amount only to a compulsory additional savings account in the amount of such additional contributions. It is further contended in support of the more liberal view that if the legislature intended to require the additional contributions they would have said it by adding that condition to the increased benefits. Reference is also made to Section 238.09 (1) (b), which prohibits deduction for annuity purposes from the compensation of a member who has attained the age of 60, if such member elects not to contribute.

Those who hold a more conservative view argue that the very foundation of the retirement system as originally set up is based upon dollar

for dollar matching by the state (in the membership service credit pension) the contributions made by the teachers, and that its basic philosophy was to deny to the teacher both the membership service credit pension and the prior service credit pension unless he, on his part, makes the required monthly contributions into his annuity. That is a substantially correct statement of the plan, although there was and is an exception, which will be referred to later.

Considered alone, and without regard to other provisions of the retirement act, its purpose, plan and actuarial soundness, the amendments and new matter might justify the more liberal view, but I think a reading of the whole act with the amendments requires the conclusion that the member must make the additional contributions in order to obtain the increased benefits. In addition to those already mentioned, the following reasons seem to require that interpretation.

It will be noted that the 1945 legislature again reopened the privileges of the act to teachers who, though eligible, had not heretofore become members. To such teachers two options are given in amended Section 238.06 (1); that is, (a) to make no contributions for the years 1939 to 1945, in which event he is not entitled to membership service credit for those years, or (b) to make contributions on or before July 1, 1947, for the years in service between 1939 and 1945 based on the prescribed rate on the basis of his salary for these years and in which event he is entitled to membership service credit for those years. There can be no doubt that under the second option he would be required to make contributions for the years 1939 to 1945 on the basis of his *actual* salary up to \$3,000.00. There is no material difference between such new member coming in under the second option from that of the member who has been making contributions on the lower maximum "earnable compensation," as fixed prior to the 1945 redefinition, and no reason appears why there should be any discrimination or distinction between the two. The fact that the second option to new members requires lump sum contributions based on the 1945 redefinition of "earnable compensation" strongly supports those who contend that additional contributions are required of present members.

Reference to another section of the retirement act also supports the more conservative view. Section 238.08 gives a member two options as to the computation of his allowance upon his retirement. Option one gives him an allowance throughout his life; Option Two gives him a smaller allowance throughout life but guarantees to his designated beneficiaries full repayment of the member's contributions, that is, full repayment of his annuity in the event he should not receive the full amount of such annuity before he dies. It is quite clear that under Option One, which in fact is the option selected by practically all of the teachers, the state has a contingent interest in the contributions which go into a member's annuity. If the member should die before he actually receives in allowance the amount in his annuity contributions, the unused portion thereof goes to the state. This refutes to some extent the argument that the state has no financial interest as to whether or not the additional contributions are made. This occasional recovery by the state of the unused portion of the member's annuity is considered in any actuarial computation of retirement benefits under Option One. I conclude that the first question must be answered in the affirmative and that such additional contributions may be made any time prior to July 1, 1947.

The same answer is given to your second question so far as additional contributions are concerned. There is no difference in the application of the amendments to a member who intends to remain in service and one who has become eligible for retirement since July 1, 1945. Both are still members of the retirement system. There is a difference, however, as to the time within which the additional contributions must be made. As stated above, a member who would not retire prior to July 1, 1947

has until that date to make additional contributions, but any member becoming eligible for retirement since July 1, 1945, must make the additional contributions before or at the time of retirement. Unless he did so it would be impossible to compute his allowance. This answers your second and third questions.

As to your fourth question, somewhat similar arguments are made for and against the additional contributions as are made in regard to the first question. I find, however, a very different legislative intent in regard to those who had retired prior to the effective date of Chapter 22693, July 1, 1945. There are two things which distinguish such persons from those who had not retired prior to the 1945 amendments. The 1945 amendment of Section 238.01 (14) after redefining "earnable compensation" added the following new matter:

"Provided also, that the retirement allowance of a teacher that has heretofore retired shall be redetermined and he shall be paid on the basis of his earnable compensation as defined by this Act." (emphasis added)

I think those words leave no room for doubt. No word is said about contributions and the language is as mandatory as words permit. The contention that this violates the basic philosophy of the retirement act as set out above is in a measure true, but in the original act there was an exception to that basic plan, to wit, under the original act no contributions were required of a member sixty years of age and yet he was entitled to both the membership service credit pension and the prior service pension, and such members have been retired and paid on that basis since the adoption of the original act in 1939. Furthermore, Section 238.06 (2) as amended has no application to such person because that subparagraph applies only to a **member** of the retirement system. A person who has retired is no longer a **member** of the retirement system. (See Section 238.05 (3)). The exemption of those who have retired prior to July 1, 1945 is comparable to, and in accord with, the reason for the exemption granted by the original retirement act to all members reaching the age of 60. There are other reasons, which need not be set out, for reaching the conclusion that the fourth question must be answered in the affirmative.

The increased benefits to a person who had retired prior to July 1, 1945 would be applicable only to the membership service credit pension and the prior service credit pension. It would not to any extent increase the annuity element of his retirement allowance. This is in answer to your fifth question.

Section 238.07 (3) of the 1945 amendment authorizes any member on or before July 1, 1947, to elect to retire at the age of 55 on the basis of service of either 30 or 35 years and when such choice has been made, it requires the trustees to immediately notify the member of the additional amount of money which the member must pay to the system on or before July 1, 1947, to compensate for the actuarial equivalent of the contributions which such member would have made had that provision been available and selected by the member at the time he became a member of the system and also to determine and notify the member of the rate of contribution to be made thereafter.

Answering questions 6 (a) and (b), if the member elects to retire at age of 55 but does not elect to make the contributions referred to in Section 238.06 (2), he will be required to make up by payment before July 1, 1947, the difference between his former rate and the new and higher rate applied to the amount of his "earnable compensation" as defined prior to the 1945 amendment. If the member elects to retire at 55 and also elects to make the contributions made optional by Section 238.06 (2), in addition to the lump sum contributions just mentioned, he will be required to pay an additional amount computed at the higher

rate on the difference between his actual salary from 1939 (not in excess of \$3,000.00) and the maximum "earnable compensation" as defined in the 1939 and 1943 acts. In either event, from the time of his election to retire at the age of 55, the contributions taken from his salary will be computed at the higher rate on his actual salary up to \$3,000.00. Whether he retires on the basis of 30 or 35 years service will also affect his higher rate.

October 10, 1946.—046-427.

ATTENDANCE ASSISTANT—ELIGIBILITY

QUESTION: Is an attendance assistant who holds a certificate prescribed by regulations of the State Board of Education eligible for membership in the teachers' retirement system?

To Honorable Colin English, State Superintendent of Public Instruction:

Membership eligibility extends to teachers as defined in Section 238.01 (4) as amended. That definition of teachers includes "any certified employee of any public free school, of any county school system."

An attendance assistant is required to hold a certificate. See Sections 232.17 (1) and 231.15. Your question is answered in the affirmative.

February 14, 1945.—045-41.

COUNTY SUPERINTENDENT—QUALIFICATIONS AND MEMBERSHIP

QUESTIONS: 1. Is a former member of the teachers' retirement system, who was retired under the provisions of Section 238.07, Florida Statutes, 1941, on reaching the age of seventy and who later, in 1944, was elected to the office of county superintendent, qualified to hold that office?

2. If the foregoing question is answered in the affirmative, what would be the status of such person's relationship with the retirement system?

To Honorable Bryan Willis, Actuary, Teachers' Retirement System:

Answering your first question, it is my opinion that a former member, who on reaching the age of seventy was retired under the provisions of the teachers' retirement system and who was later elected by the people to the office of county superintendent, is qualified to hold that office by reason of his election.

Answering your second question, the provisions of Section 238.07 (b), Florida Statutes, 1941, require retirement from the teachers' retirement system at the age of seventy, except that such member may complete the current school year with the consent of his employer. I construe this section of the statutes to mean that he would be entitled to no membership service credit after his retirement at the age of seventy and, further, that he would be entitled to none of the benefits of retirement which are paid from state funds during the time which he may serve as county superintendent after reaching the age of seventy.

GENERAL PROVISIONS FOR INSTITUTIONS OF HIGHER LEARNING

April 11, 1946.—046-146.

ALIENS—SCHOLARSHIPS

QUESTION: Is a young lady eligible to take the examination for Lewis Scholarship for the preparation of teachers, the young lady having

been born in Canada of alien parents, Canadian citizens, who have resided in the State of Florida for two years and have taken out their first papers?

To Honorable Colin English, State Superintendent of Public Instruction:

Chapter 22944, Acts of 1945, which authorized these scholarships sets up in Section 5 certain eligibility requirements but does not include citizenship as one of them. The same Section also authorized the State Board of Education to "prescribe standards and requirements which shall be met by persons who are eligible for such scholarship." Even without the quoted provision the state board has authority to adopt rules and regulations governing such matters and such rules are binding in so far as they are not in conflict with a statute.

Following the enactment of Chapter 22944, the State Board of Education adopted certain rules and regulations covering the scholarships authorized by that chapter. Among these rules and regulations is one requiring the applicant to present satisfactory evidence of citizenship, thereby at least strongly implying requirement of citizenship. This is consistent with Section 239.19 relating to senatorial and house of representatives scholarship under which citizenship is one of the essential requisites for the scholarships.

The Federal Act, U. S. C. A., Title 8, Section 714, provides that a child born outside of the United States of alien parents becomes a citizen of the United States upon the naturalization of the parents if the child was under eighteen years of age at the time of the naturalization of the parents and provided also that at the time of the naturalization of the parents the child is residing in the United States or thereafter begins to reside permanently in the United States while under the age of eighteen years.

The filing by the parents of their first papers is only the beginning of proceedings leading up to naturalization, and the child does not acquire citizenship through the naturalization of its parents until the naturalization is complete, and not even then if over the age of eighteen years. Accordingly, the young lady in question is not a citizen, and under the rules and regulations of the state board she is not eligible to take the examination.

May 13, 1946.—046-198.

ADMISSION OF MINOR STUDENT—CONSENT OF PARENTS

QUESTION: May the Florida State College for Women admit as a student a young lady of the age of 19, if her parent refuses to make the affidavit that she is a bona fide resident of the State of Florida, etc., required by Section 239.02 of the Statute, and where the fact of her residence in the state is satisfactorily proved by affidavits of other responsible persons?

To Honorable Doak S. Campbell, President, Florida State College for Women:

It seems that the young lady in question has been employed for some time and is self-supporting, that she wishes to enter the college as a student, and that her mother refuses to execute the affidavit required by Section 239.02 because she is unwilling for her daughter to attend the college this year. You have received written notice from the mother of her objection to the daughter entering the college this year. No mention is made of the young lady's father and I assume that her mother is her only parent. There is actually no question as to the young lady being a bona fide resident of the state.

Consideration of the Statute, 239.02 leads to the conclusion that while admission requires the affidavit of the parent of a minor, or of a minor's guardian if there be no parent, the purpose was to provide a very simple and informal method of proof of the bona fide residence of the applicant. It is my opinion that the legislature did not intend that the affidavit of the parent or guardian should be an absolute requirement for admission, but the residence might be otherwise established if for any reason the strict letter of the Statute in that respect could not be complied with. Accordingly, it is my opinion that the affidavits of other responsible persons as to her residence, if deemed satisfactory by the Board of Control or the college authorities, would satisfy the statute under the circumstances in this case.

I think, however, that you have overlooked a more important matter. You have been notified by the young lady's mother that she is unwilling for her daughter to enter the college this year. The mother has stated in very general terms why she is unwilling for her daughter to enter college this year. Her reasons for withholding consent may or may not be good. It is not necessary for her to give her reasons. The young lady is a minor and subject to the will of her parent in such matter. Under the circumstances in this case it is my opinion that you have no authority to admit this young lady against the expressed wishes of her parent.

June 28, 1945.—045-162.

FLORIDA STATE COLLEGE FOR WOMEN—ADMISSION

QUESTION: Where nonresidents parents appoint a resident of Florida guardian of the person of their daughter, a minor, "for technical reasons" and "for the purpose of making said 'A' (the minor), eligible for entry in certain schools in the State of Florida," which appointment is accompanied by an affidavit of the Florida resident thus appointed guardian of the person of the minor, satisfactorily showing that he is and has been a resident of the State of Florida for many years, is such minor entitled to admission as a student in the Florida State College for Women?

To the State Board of Control:

Section 239.02, Florida Statutes, 1941, reads, in part, as follows:

"Provided, however, that in all applications for admission by students as citizens of the State of Florida, the applicant, if twenty-one years of age, or if a minor, his parents or guardian, shall make and file, with such application, in writing a statement under oath that such applicant is a bona-fide citizen and resident of the State of Florida and entitled, as such, to admission upon the terms and conditions prescribed for citizens and residents of the state."

The affidavit submitted does not comply with that provision in that it fails to say under oath that the applicant, that is the minor, is a bona fide citizen and resident of the State of Florida and entitled, as such, to admission upon the terms and conditions prescribed for citizens and residents of the state. Accordingly, it is my opinion that the papers submitted are insufficient to entitle the applicant to admission.

Other questions, such as your duties in such cases as this and whether or not admission can be obtained in the manner attempted, are reserved until such statement under oath as required by the statute is filed.

January 30, 1946.—046-39.

SCHOLARSHIP ACT—HOME ECONOMICS TEACHER

QUESTION: May a young woman who wishes to teach home economics in the public schools of the state register in the School of Home Economics instead of the School of Education at the Florida State College for Women and receive the scholarship aid provided by Chapter 22944, Acts of 1945?

To Honorable Colin English, State Superintendent of Public Instruction:

Reference is made to my opinion of September 20, 1944, Biennial Report 1943-1944, page 286, wherein I considered the same question as to scholarships provided by Section 239.19 of the statutes. The scholarship provided by Chapter 22944 is conditioned upon exactly the same requirement, that is, registration in the School of Education, and all that was said in the opinion of September 20 has application to the scholarships provided by Chapter 22944, Acts of 1945.

In my opinion of September 20, 1944, I suggested one solution for the difficulty. Furthermore, I observe that the college at this time includes several different curricula in its School of Education and it should be possible to add to these a curriculum in home economics, giving such degree or degrees as the work of the scholar may warrant. In other words, the college could permit the scholar to do her essential work in home economics in the School of Education.

It was the intention of the legislature to require the holders of the scholarships to take the courses designed to train them in the art or science of teaching, and probably assumed that such courses were given only in the School of Education. The legislature having specifically required registration in the School of Education, I think it will be necessary for the college to adapt its courses to fit that requirement.

April 20, 1945.—045-98.

SCHOLARSHIPS—LEGISLATIVE

QUESTIONS: 1. Are Sections 239.19 to 239.24, Florida Statutes, 1941, to be construed to provide scholarships so that the total number becomes available each year on a cumulative basis until at the end of a four-year period there would be four times the number of scholarship holders as there are members in both houses of the legislature, or so that the maximum number at any one time would be exactly equal to membership in the two houses of the legislature?

2. If a student in his junior year at college takes the competitive scholarship examination and is awarded the scholarship, could the student use the scholarship for a year or more of study at graduate level at one of the state institutions of higher learning?

3. One of the requirements for scholarship is graduation from an accredited senior high school. Does this mean that only a high school graduate who had not entered college is eligible, or is that requirement to be considered the minimum educational requirement?

4. Is a person who has already completed one or more years of college work eligible for one of these scholarships?

5. Is a person who has completed a four-year college course and holds a degree eligible for such scholarship in the event he wishes to spend a year or more doing graduate work at either of the two institutions of higher learning?

To Honorable Colin English, State Superintendent of Public Instruction:

Section 239.19, in part, is as follows:

"Annually, every senatorial district of this state is allowed one scholarship for men at the University of Florida and one scholarship for women at the Florida State College for Women; and annually, every county of this state is also allowed the same number of scholarships for men in the University of Florida as the county has representatives in the house of representatives; and, annually, each county of this state is allowed as many scholarships in the Florida State College for Women as the county has representatives in the house of representatives of the State of Florida."

Section 239.23 reads as follows:

"These scholarships shall be renewable from year to year for not more than four years on the basis of professional fitness of the students holding them."

The two quoted sections allow, at each of the two institutions, annually, the following scholarships: (a) one scholarship for each senatorial district, and (b) to every county the same number of scholarships as it has representatives in the house of representatives. The holder of each scholarship has the privilege of renewing it for a maximum of four years. It is my opinion that the legislature intended to provide only one senatorial and one representative scholarship to each of the two institutions of higher learning to run at the same time. In other words, so long as the student to whom the award was originally made continues by renewal for a maximum of four years, no other scholarship may be awarded until he has completed his four years. If he should fail to renew for any of the four years, then another scholarship may be awarded. Accordingly, the maximum number at one time in either institution of higher learning would be exactly equal to the number of members of the two houses of the legislature.

The statutes do not restrict scholarships to undergraduate work and any part of the four years to which the scholarship may extend, may be used at graduate level; provided that the student registers in the teachers' college at the university or in the School of Education at the Florida State College for Women, or if it is senatorial state scholarship, registration may be in any vocational school or college at either institution.

Answering your third question, in my opinion, the requirement of graduation from a senior high school is to be considered only as a minimum educational requirement and does not confine eligibility to those who have not entered college.

Your fourth and fifth questions are answered in the affirmative, with the same proviso as to registration as set out in my answer to your second question.

April 25, 1946.—046-174.

SCHOLARSHIPS NOTE—MANNER OF PAYMENT

QUESTION: May the holder of a senatorial state scholarship who has executed a note covering the amount appropriated for him as holder of such scholarship, as required by Section 239.24, pay or satisfy the note in any manner other than payment in money?

To Honorable Colin English, State Superintendent of Public Instruction:

Section 239.20 provides that senatorial state scholarships may be held in any vocational school or college at the university or at the Florida

State College for Women without the requirement as to teaching two years after graduation. However, Section 239.24 is applicable to both house and senatorial state scholarships and if, in fact, the recipient of the senatorial state scholarship should actually teach in Florida after graduation, he would be entitled to have his note satisfied and cancelled upon submitting "evidence of having taught for two years in Florida after graduation."

BOARD OF CONTROL

May 18, 1946.—046-208.

BOARD OF CONTROL—CORRECT NAME

QUESTION: What is the correct name of the Board of Control?

To Dr. John J. Tigert, President, University of Florida, Gainesville, Florida:

Your letter points out that the board has been designated by five or six different names but you had understood that in revising the statutes one name had been used throughout.

The act of 1905 creating the board designates it, "Board of Control" in all except two or three instances when it is called "State Board of Control." In the suit attacking the constitutionality of the act in 1905 it appears that the then attorney general and other counsel in the case had some doubt about whether the name was Board of Control or State Board of Control, but no issue was made on the question. In the revision of the statutes the exact wording of the original act has been followed and no changes made.

It is my opinion the correct name is "Board of Control." That is the name used in the original and present section of the act creating the board.

In 1905 a corporate seal was adopted. Around the top of the seal appear the words "Board of Control"; around the lower half appear the words "State of Florida." The latter words are merely descriptive and by way of identification.

In order to definitely identify the board I suggest that papers to be executed by the board be prepared as follows:

When the board is first mentioned in the paper it should be designated, "Board of Control, a public corporation of the State of Florida." This will sufficiently describe and identify the Board for all purposes. All further reference to the board in the paper, as well as the signature, may then be simply, "Board of Control."

August 26, 1946.—046-359.

HOUSING—CONTRACT OF RENTAL

QUESTION: May the university (Board of Control) enter into a contract to rent certain residences for a period of three years, to be used by teachers in the university?

To Dr. John J. Tigert, President, University of Florida, Gainesville, Florida:

As I understand the situation, there is a serious shortage of houses, and at this time university teachers substantially in excess of the number who could be served by the 36 houses involved in your question are without any place to live. I further understand that the houses are incomplete but that the owner of the houses can get the necessary money to promptly complete them if he can get a contract from the university to rent the houses for three years.

A lease contract for three years would be creating a state debt which is prohibited by the constitution. Contracts for current requirements are permissible but must be within the state agency's appropriation or presently available funds, and may not extend beyond the current biennium. The fact that it would be to a large extent self-liquidating would not change the rule. I think you would be limited to a lease contract expiring July 1, 1947, with option to renew. Perhaps you can persuade the financing people that your needs for these houses will be as urgent at the beginning of the next biennium as now.

September 4, 1946.—046-366.

HOMES—LEASE—COMPLETION

QUESTION: By what lawful means may the Board of Control acquire the use of the 36 uncompleted houses for a period of three years for the housing of university teachers who are unable to find places to live at or near the university?

To Dr. John J. Tigert, President, University of Florida, Gainesville, Florida:

It is my understanding that the reasonable rental value of these houses for a period of three years would approximate the cost of completing the houses. If the Board of Control now has sufficient funds, or if such funds are made available, the money necessary to complete the houses may lawfully be advanced for their completion under a written agreement for the use and occupancy of the houses by the Board of Control its lessees and sub-lessees, for such period of time as may be agreed by the parties to equal in value the cost of the completion. Obviously the disbursement of such money for the completion of the houses should be under the control of the board. No such agreement should be made unless the owner has good title and all mortgages and liens on the property are subordinated in any and all events to the use and occupancy of the property by the board, and its lessees and sub-lessees for the agreed period of time.

October 1, 1946.—046-412.

PAYMENT FOR BUILDINGS—LEASE

QUESTION: May I lawfully issue warrant for \$50,000, payable to the Board of Control, requisitioned by that board to pay for the use and occupancy of certain dwellings needed at the university for the housing of teachers, as provided in lease contract of September 9, 1946, between Stengel Field Housing, Inc., and the Board of Control?

To Honorable J. M. Lee, State Comptroller:

In my opinion of September 4, 1946, to Dr. Tigert, president of the university, of which you have a copy, I outlined a procedure by which the use of these houses, urgently needed for housing of teachers, might be lawfully acquired. Following the plan set up in that opinion, the Board of Control entered into a contract with Stengel Field Housing, Inc., on September 9, 1946, leasing 20 partially completed houses for a period of three years from their completion for a total consideration of \$50,000, the consideration to be placed in escrow and released in fixed amounts from time to time as each building is completed. On September 2, 1946, the State Board of Education approved the acquisition of the use of these houses, and on September 10, 1946, the Board of Commissioners of State Institutions gave its approval and made available from the building fund the sum of \$50,000, authorizing and directing you to issue warrant for that amount, and for that purpose to the Board of Control. It is my opinion that you may lawfully issue the warrant.

October 9, 1946.—046-426.

PAYMENT OF BUILDING PERMIT FEES—REQUIREMENT

QUESTION: May the Board of Control be required to pay building permit fees charged by certain cities in connection with the issuance of building permits for the construction, repair, remodeling, etc. of buildings for use of the institutions of higher learning located in the cities?

To the Board of Control:

The Board of Control is a state agency. The rule is that a municipality may not impose a tax or license fee upon the state unless the statute clearly authorizes it. I am unaware of any statute authorizing any city in this state to impose such a fee on a state agency. The courts have held that no building permit may be required of the state or its agencies by any of its municipalities. *City of Atlanta vs. State*, 182 S. E. 184; *City of Milwaukee vs. McGregor*, 121 N. W. 642. Your question is answered in the negative.

May 13, 1946.—046-199.

TEMPORARY UNIVERSITY BUILDINGS—FORM OF CONTRACT

QUESTION: May the Board of Control lawfully award a contract for the construction of temporary buildings at the university on a cost plus basis or without advertising or otherwise calling for bids?

To the Board of Control, Florida State College for Women:

You state that funds have been allotted by the improvement commission and the Board of Commissioners of State Institutions for the erection of seven temporary dormitories and one temporary reading room to be occupied by veterans at the university, and that the estimated total cost will be approximately \$160,000.00. I presume the allotment is from the building fund set up in Chapter 22820.

The laws of the state do not require advertising or calling for bids for such construction by the Board of Control nor is a cost plus contract prohibited. It is my opinion, therefore, that your board may lawfully enter into a contract for such construction without calling for bids and also that it may execute a cost plus contract if it deems such a contract advisable.

I wish to add, however, that if all funds for these projects are to be supplied by the Board of Commissioners of State Institutions it will be necessary for the cost plus contract to contain a provision fixing a maximum cost not in excess of the amount allotted for the construction by the Board of Commissioners of State Institutions.

June 29, 1945.—045-164.

AGRICULTURAL EXPERIMENT STATION—REVOLVING FUNDS

QUESTION: What is the effect, if any, of Section 13, Chapter 22827, Acts of 1945, the General Appropriations Act, upon Section 240.10, Florida Statutes, 1941, relating to revolving funds of the Agricultural Experiment Station and other institutions under the control of the State Board of Control and the Board of Commissioners of State Institutions?

To the Agricultural Experiment Station, University of Florida, Gainesville, Florida:

Section 240.10 of the statutes authorizes establishment of revolving funds at the several institutions under the supervision of the State Board of Control and the Board of Commissioners of State Institutions, from

which revolving funds are paid wages of laborers, postage, freight bills, express bills, minor emergency repairs, etc., where such expenses are necessary and regular expenses of the institution. The act further provides that when proper vouchers drawn by the board to refund such amounts to the revolving fund have been audited and approved by the comptroller, he may draw warrants for the payment of such moneys back into the revolving fund. The section also provides for deposit of such revolving funds in a bank, fully secured at all times, and also requires all persons handling the fund to be adequately bonded.

Section 13 of the appropriations bill of 1945 reads as follows:

"Any sum or sums appropriated for salaries, if not required for such purposes, may be applied to expense of the department to which they are appropriated, but in no event shall any sum or sums specifically appropriated for expenses be applied to salaries, except, that day labor shall be construed as coming within expenses. Any sum paid out under this act or any other act from the monies appropriated herein shall be by State Warrant drawn by the Comptroller and countersigned by the Governor upon the State Treasury, payable to the ultimate beneficiary."

The only difference between this section and similar sections in the 1941 and 1943 General Appropriations Bills is that the latter two contain the following proviso:

"... provided that this requirement shall not apply to any funds appropriated for the State Board of Control or to funds appropriated for institutions under control or management of the State Board of Control."

Apparently, the legislature regarded the proviso as unnecessary and surplusage, and omitted it from the 1945 act. It will be observed that the proviso did not except institutions under the Board of Commissioners of State Institutions, and yet departmental construction during the years following the 1941 and 1943 acts has considered the section as not prohibiting the refund of expenses to the revolving funds of the institutions under the control of the board of commissioners, and I think such interpretation is correct. It is my opinion that the institution receiving the refund to its revolving fund is the ultimate beneficiary within the meaning of Section 13 of the Appropriation Act. To hold otherwise would, in effect, repeal all of the foregoing provisions of Section 240.10 by implication and abolish all such revolving funds, and I do not read anything in the act indicating any such legislative intent. The institutions under the Board of Control, as well as those under the Board of Commissioners of State Institutions, could not function without the revolving funds. It is my opinion that Section 13 of the 1945 Appropriation Act does not affect Section 240.10 of the statutes, and that the comptroller may continue to draw warrants to the institution for the repayment of such moneys back into the institution's revolving fund as heretofore.

May 18, 1946.—046-207.

STATE AGENCIES—OPA CEILING PRICES

QUESTION: Does the OPA ceiling price established for the sale of certain machinery and equipment apply to a sale by the Board of Control?

To Board of Control, Florida State College for Women:

You explain that you have recently accepted a bid for certain unneeded machinery and equipment and before completing the contract discovered that the Office of Price Administration had placed a ceiling price on the sale of such equipment. Your question is based upon the doubt whether the ceiling price fixed under the Emergency Price Con-

trol Act applies to a state or a state agency. The question was quite recently settled by the Supreme Court of the United States in the case of *Case vs. Bowles*, 66 S. Ct. 438, 90 L. Ed. 398, wherein it was held that such ceiling prices govern sales by states or state agencies as well as other political subdivisions. Accordingly, your question is answered in the affirmative.

February 9, 1945.—045-29.

PERMANENT DESIGNATION OF BUILDINGS

QUESTION: In instances where various buildings at Florida State College For Women, Florida State Hospital and Florida Industrial School for Girls have been named in honor of certain persons, is legislative authority required to insure permanent designation of such buildings by such names heretofore given them?

To Honorable John T. Wigginton, Secretary, Board of Commissioners of State Institutions:

No attempt has been made to search out the various appropriation acts or other laws authorizing the construction of buildings at such institutions to ascertain if the names of any of such buildings were included in such laws, since such seems unnecessary in view of the conclusions set forth below.

The State Board of Education is a constitutional board and with respect to "schools of higher grades" is granted such supervision "as the law shall provide." Article XII, Section 3, Florida Constitution. The Board of Commissioners of State Institutions is a constitutional board and is granted "supervision of all matters connected with such institutions in such manner as shall be prescribed by law." Article IV, Section 18, Florida Constitution. The Board of Control is a statutory board, Chapter 240, Florida Statutes, 1941.

It would seem, therefore, that the legislature has the power to name a building of any one of these institutions and, having that power, can exercise it at any time. Legislative designation of the various buildings at these institutions by the names heretofore given them in honor of certain persons would render such designation more "permanent." The term "permanent" is to be qualified by the reflection that a subsequent legislature would hardly be bound in the premises by the action of a prior one.

November 15, 1946.—046-464.

TEACHER SALARIES—USE OF SURPLUS FUNDS

QUESTION: May the Board of Control use for payment of salaries of teachers and other employees of the college, surpluses and balances in the Westcott estate trust fund, the bookstore, the laundry, the soda shop accounts, each in the amount of \$10,000 and not needed for other purposes, the sum of \$40,000 allocated by the budget commission from the emergency fund for a boiler for a heating plant in the college, and an unused balance of \$6,500 allocated by the budget commission from emergency fund for I. B. M. machines?

To Board of Control, Florida State College for Women:

It is my understanding that in view of the great increase in the cost of living and the resulting inadequacy of the salaries of teachers and other employees of the college, the board recently declared that an emergency exists, and authorized increases in salaries, effective, if possible, December 1st; and that funds budgeted for salaries will be in-

sufficient for these increases for the remainder of the scholastic year by approximately \$85,000. You have explained that the several balances or sums mentioned in the question will not be needed during the current school year. I further understand that the balance of approximately \$10,000 in the Westcott estate trust fund are funds available for use for "state-wide" purposes as distinguished from the Westcott funds restricted to Leon county beneficiaries.

Under the terms of the will the Westcott funds may be used for the college for any purpose the Board of Control may see fit, other than for construction of buildings or improvement of grounds. The balances in the bookstore, laundry and soda shop auxiliary accounts come within the provisions of Section 3 of the General Appropriation Act of 1945 and may be expended as your board may direct. As to all of those funds, your question is answered in the affirmative.

The sums allocated by the budget commission from the emergency fund for the heating plant boiler and the I. B. M. machines may be used for no other purpose without reallocation by the budget commission. If those two last mentioned sums should be reallocated by the budget commission for the purpose of paying the college teachers' and other employees' salaries, they also may then be used for that purpose.

INSTITUTIONS OF HIGHER LEARNING

August 21, 1946.—046-373.

UNIVERSITY OF FLORIDA—SCHOLARSHIPS—WOMEN

QUESTION: Is the holder of a Lewis Scholarship, who is a woman, entitled to admission to the university in the School of Education?

To Dr. John J. Tigert, President, University of Florida, Gainesville, Florida:

The Lewis Scholarships were established by Chapter 22944, Laws of 1945. Section 6 of that Chapter (Section 239.42 Cum. Supp.) requires that the holder of the scholarship "shall be a bona fide student in the college or school of education in a Florida State institution of higher learning."

Section 241.03 of the Statutes of 1941, in part, reads as follows:

"No person shall be admitted to said university, except white male students having the prerequisite qualifications to which the board of control may add others in their judgment and discretion, except to the normal department thereof, for the instruction and education of teachers, when both male and female students may be admitted to that department."

If the applicant enrolls in the School of Education, as she is required to do by Chapter 22944, she is entitled to admission at the university under the quoted provision of Section 241.03.

December 14, 1945.—045-389.

VETERAN'S WIFE—ADMISSION TO THE UNIVERSITY OF FLORIDA

QUESTION: May the Board of Control and the State Board of Education admit to the University of Florida a veteran's wife who holds a Lewis scholarship and whose husband is attending the University of Florida on an athletic scholarship although the veteran does not benefit under the G. I. Bill of Rights?

To Honorable Colin English, State Superintendent of Public Instruction:

The wife in this case holds one of the scholarship provided by Chapter 22944, Laws of 1945. Section 6 of that chapter requires that the holder of the scholarship "shall be a bona fide student in the college or school of education in a Florida State institution of higher learning." Accordingly, in order to make use of this scholarship the wife must enroll in the School of Education in one of the institutions of higher learning. Section 241.03 of the Statutes of 1941 reads in part as follows:

"No person shall be admitted to said university, except white male students having the prerequisite qualifications to which the board of control may add others in their judgment and discretion, except to the normal department thereof, for the instruction and education of teachers when both male and female students may be admitted to that department."

Even if the court should hold that admission of women to the normal department of the university is not mandatory under the quoted excerpt from Section 241.03, it is at least permissive. Accordingly, the State Board of Control has ample authority to permit the enrollment of the wife in this case in the School of Education at the university. She or persons in like position might also be admitted by a rule or regulation or resolution made at a joint meeting of the Board of Control and the State Board of Education, which latter procedure is authorized by Section 240.04.

July 16, 1946.—046-311.

FLORIDA STATE COLLEGE—MALE ENROLLMENT

QUESTION: May an unmarried ex-service man, 20 years of age, resident of Florida, certified by the Veterans' Administration for educational privileges under the GI Bill of Rights, be enrolled as a student in music at the Florida State College for Women for the regular term beginning in September when no other state-supported institution gives the course in music desired by the young man?

To the Board of Control, Florida State College for Women:

I am unable to find any authority for such enrollment. The relevant portion of the statute covering those who are entitled to enrollment at the Florida State College for Women, Section 241.39, reads as follows:

"None but female white students may be admitted to this institution . . ."

The only exception at the college is set up in Chapter 22596 of 1945, Section 241.05-1, Cum. Supp., which, in subsection 2, authorizes any white male student who is the husband of a student enrolled at the college, the latter a bona fide service woman obtaining the benefits of the GI Bill, to enroll at the college. That act does not qualify the young man for enrollment.

It is my opinion that under the statute your question must be answered in the negative.

August 24, 1945.—045-268.

ENROLLMENT OF HUSBANDS AND WIVES IN SAME INSTITUTION

QUESTION: In which cases are wives eligible for enrollment as students in the University of Florida and husbands eligible for enrollment as students in the Florida State College for Women, under Chapter 22596, Acts 1945?

To Honorable J. T. Diamond, Secretary, State Board of Control:

The legislature considered it likely that married service men might want to continue their education at the university after their discharge from service and that married service women might want to continue their education at the Florida State College for Women after their discharge from service, and that in many instances such husband or wife, respectively, might also wish to continue his or her education. Chapter 22596 was enacted to enable such husband and wife, where they so desire, to continue their education at the same institution, and was designed to avoid the separation of husband and wife.

It is my opinion that the chapter gives the privilege of admission to the wife or husband of any service man or service woman where the service man or service woman is eligible under Title 2, Chapter 4, of the Servicemen's Readjustment Act of 1944, the GI Bill, Title 38, U. S. C. A., Chapter 12, Sec. 701 (f) and note, to receive the education and training provided by that act or the act referred to as Public Law 16, 38 U. S. C. A., Chapter 12, note (Veterans' Regulation No. 1 (a), Parts VII and VIII). It is my opinion that it is not necessary that such service man or service woman actually receive the benefits provided in the Servicemen's Readjustment Act of 1944 or Public Law 16. It is sufficient if they are eligible for such benefits. See Section 3 of the chapter.

Such husband or wife must meet the educational institution's requirements for admission of students, other than sex.

June 3, 1946.—046-242.

BRANCH EXPERIMENT STATION—PURCHASE PRICE

QUESTIONS: 1. Would the establishment of a branch agricultural experiment station on land described as: "The West Half of Section 15 and the East Half of Section 16, Township 3 North Range 29 West, in Santa Rosa county," satisfy the requirements of Section 241.45, Cumulative Supplement (Chapter 21987 of 1943), as to location?

2. May the funds appropriated by Chapter 22827, the General Appropriation Act of 1945, Item 35, for salaries and expense of operating such station, which will not be needed during the biennium be used to pay the purchase price of the land acquired for the purpose of establishing the station?

To Board of Control, Florida State College for Women:

It appears from documents attached to your letter that a thorough investigation was made of lands in the northern part of Santa Rosa and Okaloosa counties near the boundary line between those counties; that no lands were found nearer the boundary lines suitable in area, soil condition or comparable to the lands in that part of the state to be served by the station; and that the above tract is the nearest, suitable, available tract of land for the purposes of the station.

The primary purpose of the statute was to establish an experiment station which would properly serve that part of the state. In order to perform its functions in that respect it is necessary to have land typical of the northwest Florida lands which are desirable for farming. The approximate location was definitely of secondary importance, and not essential to the purposes of the act. Assuming the facts to be as stated above, the land described is, in my opinion, sufficient compliance with the statute as to location.

Funds appropriated for salaries when not needed for that purpose may be used, when necessary, for expenses. See Section 13 of the 1945 General Appropriation Act. The purchase of the land for the purpose of establishing the station may be considered an expense, and therefore,

the funds appropriated for salaries and expense of the station which are not needed for those purposes may be used for the purchase price of the land.

May 23, 1946.—046-226.

BOARD OF CONTROL—EMPLOYMENT OF FACULTY MEMBER

QUESTION: May a member of the faculty of the University of Florida accept employment, as an engineer or architect, by the Board of Control of this state, to prepare plans for the construction of state buildings and receive compensation for the same?

To Honorable J. M. Lee, State Comptroller:

It appears from the file in this case that N. C. Ebaugh (Newton C. Ebaugh) and J. W. Wilson (John W. Wilson), members of the faculty of the University of Florida, on October 21, 1945 and May 11, 1946, entered into formal agreements with the Board of Control of this state, to prepare plans for certain public buildings to be constructed by or for the said Board of Control. Under these agreements N. C. Ebaugh was to receive "2% of the cost of the plumbing and heating work" in connection with the said building and J. W. Wilson was to receive "2% of the cost of the electrical work" in the construction of said buildings. The above mentioned 2% of the cost of the said work is payable, 1½% when the contract is let and the balance when the final shop drawings are checked and approved.

The State Board of Control and its proper agents have approved for payment the sum of \$1200.00 to Newton C. Ebaugh and the sum of \$600.00 to John W. Wilson in connection with the above mentioned work.

It does not appear from the statutes and laws of this state that a faculty member is any thing more than a state employee. He does not appear to be a state official.

It does not appear from the file furnished us and I know of no agreement between the Board of Control and the faculty members of the University of Florida stipulating that such faculty members must serve the Board of Control exclusively and prohibiting their outside employment. In this connection, the author of 39 C. J. 124, Section 162, states: "In the absence of an express or implied agreement upon the part of the employee to devote his entire services to the service of the employer, he may employ such time as is not required in the performance of his duty to his employer in such way as he may deem advantageous to himself, provided it is not inconsistent with his contract or detrimental to his employer's interest or to the value of his services to his employer."

Even if we should consider the faculty members as state officers, then I do not think that employment such as this would be void as it would not constitute the holding of two offices (State v. Futch, 122 Fla. 837, 165 So. 907; 46 C. J. 1037, §307).

I know of no reason why the above rules relating to employment generally, would not apply to the employees in question.

I am, therefore, of the opinion that the above question should be answered in the affirmative, unless there be some agreement between the Board of Control and its faculty members which prohibits them obtaining outside employment.

MISCELLANEOUS EDUCATIONAL LAW

December 31, 1945.—045-401.

COUNTY SUPERINTENDENTS—COMPENSATION

QUESTION: What county school funds may be included for the purpose of computing the salary of school superintendents?

To Honorable Colin English, State Superintendent of Public Instruction:

1. Are all revenue receipts of the county board of public instruction during any year to be included? (Revenue receipts include all monies received which add to the assets of the county board. They include receipts from county and district taxes and tax redemptions, state teachers salary fund, state and federal vocational funds, and in some counties racing commission funds, national forest funds, foundation program funds, payments in lieu of taxes from the Federal Government, and other similar items.)

2. All counties receive textbooks which are purchased from state funds and some counties from time to time receive grants or gifts of property. May the cash value of any such properties be included as receipts for the purpose of computing the salary of county superintendents?

3. In connection with the school lunch program a number of counties serve as agents for transmitting to the schools federal school lunch funds which are used in reimbursing the schools for funds expended for lunches. May such receipts be included in determining the salary of the county superintendent?

4. What, if any, funds classed as nonrevenue receipts may be considered in determining the salary of the county superintendent? (Non-revenue receipts may be described as receipts which do not increase or add to the net worth or assets of the county school system). Nonrevenue receipts include receipts from short-term loans specifically excluded by the act, receipts from sale of bonds, sale of property, insurance, sale of liquid investments and similar items.

Neither the amendments of 1943 nor 1945 made any change in that part of Section 242.01 to which your questions relate; in that respect the present statute is exactly the same as when construed in the opinion of October 2, 1940.

Section 242.01 provides that the salaries of county superintendents shall be based upon certain percentages of the "total annual receipts of each of said counties from all sources for school purposes, including special tax school district taxes and moneys apportioned to the said counties from the state teachers salary fund." The statutes also places certain maximum limitations upon the salary.

You inquire whether all revenue receipts, as defined in your first question, may be included in the sum on which the county superintendent's salary is based. In general, such receipts would be included, but I am not prepared to give a categorical answer to the question. The word "revenue" is as ambiguous as the word "receipts." Reasonable difference of opinion may arise as to what are revenue receipts and what are non-revenue receipts. Due to the ambiguity of the word "receipts" as used in the statute, I think it is necessary to determine in each instance whether the item is "receipts" within the meaning of the act. It is my opinion that the several kinds of receipts specifically named in your first question may be included in the funds on which the superintendent's compensation is based.

As to the credit for textbooks, I concur in the opinion of my predecessor of October 2, 1940, wherein he held the amount of such credit could not be lawfully included. Under the statutes the duties of the county school authorities extend only to custody, distribution, care, etc. of the textbooks. The textbooks never at any time become the property of the county; the title remains always in the state. See Section 233.47 of the statutes. The textbook credit is not a "receipt" within the meaning of the statute. For other reasons, occasional gifts or grants of property are not, in my opinion, within the meaning of "receipts" as used in this statute. They are rare, irregular, uncertain and it is highly improbable that they were in the mind of the legislature as a part of the measure for calculating the superintendent's salary.

It is my opinion that federal funds transmitted to the schools for the school lunch program or for reimbursement of funds expended by the schools for lunches may be included. This is in conformity with my opinion of September 17, 1943, Attorney General's Biennial Report of 1943-1944, Page 257.

Answering your fourth question, I refer to what is said above on classifying receipts into revenue and nonrevenue receipts. The item of receipts specifically named in your fourth question may not, in my opinion, be included in the funds used as a basis for determining the county superintendent's compensation.

July 19, 1946.—046-314.

TEACHERS' RETIREMENT SYSTEM—ELIGIBILITY

QUESTION: Is the St. Petersburg Junior College a part of the county school system of Pinellas county, and are the members of the instructional staff of this college eligible for membership in the teachers' retirement system?

To Mr. Bryan Willis, State Auditor:

The data accompanying your inquiry disclose that the St. Petersburg Junior College was organized in 1927 as a corporation not for profit under what is now Section 617.01 of the Statutes of 1941. It appears to have been founded by the then county superintendent of public instruction who acted as president of the junior college, and for a part of the first year used one of the high school buildings for its classes. It is largely supported by the City of St. Petersburg. One or more teachers doing part-time work in the college also do part-time work in the public school system.

The county superintendent states that the board of public instruction works in close harmony with the college but there is no official connection between the college and the county board.

Section 242.41 of the statutes authorizes the county boards of public instruction in counties having a population of not less than 50,000 to establish junior colleges or to take over such colleges already established, with certain restrictions. The last portion of that section reads as follows:

"... except, that the provisions of this law shall not apply to St. Petersburg Junior College in Pinellas county; and, provided further, that there shall not be more than one junior college in Pinellas county."

The fact that the City of St. Petersburg contributes to the support of the college does not make it a part of the public school system.

The St. Petersburg Junior College is not operated or conducted by the county board and is no part of the public school system. The statutes further prohibits the county board of Pinellas county from taking over this particular junior college.

The teachers' retirement system is restricted to teachers employed in the public free schools of any county school system, members of the teaching staff of the institutions of higher learning and certain other employees connected with state educational institutions and departments. The St. Petersburg Junior College is not one of them.

Both your questions are answered in the negative.

CHAPTER XIII

MILITARY CODE AND RELATED MATTERS

FLORIDA DEFENSE FORCE

April 1, 1946.—046-125.

STATE GUARD—STATUS

QUESTION: How long can the Florida State Guard continue to function with legal authority and when shall the discharge of the Florida State Guard take effect?

To Honorable Millard F. Caldwell, Governor:

In my opinion the Florida State Guard shall continue to function and shall not be discharged until the control of the National Guard is returned to the State. (Section 251.14, Florida Statutes, 1941).

I am in receipt of a letter from the Secretary of War, the Honorable Robert P. Patterson, copy of which is enclosed and which discusses the subject in detail.

MILITARY CODE

June 27, 1946.—046-277.

LOST CLOTHING—METHOD OF REPAYMENT

QUESTION: May Florida State Guard funds, received under the provisions of Section 250.47, supra, be used to reimburse the Federal Government for the loss of items of lost clothing?

To Honorable Bryan Willis, State Auditor:

Section 251.02, Florida Statutes, 1941, provides that the governor may prescribe rules and regulations for the organization, administration, equipment and maintenance of the Florida State Guard. By command of the governor rules and regulations were promulgated and adopted August 1, 1943. Paragraph 10, Section 1 thereof provides

"Property Accountability: Bonds: Each Company Commander will be held both responsible and accountable for all arms, uniforms and equipment issued for use by his company, and shall furnish a bond, payable to the Governor of the State of Florida in the sum of \$1,000.00 with such surety as may be required by the Adjutant General, conditioned for the faithful care and safekeeping of such public property as may be at any time committed to his custody. Applications for surety bonds will be filed by the Adjutant General and premiums will be paid by the State."

Paragraph 6, Section 1 thereof provides:

"Administration: The Florida State Guard shall be governed, disciplined, trained and equipped in accordance with the provisions contained in the Military Code, State of Florida, in so far as may be practicable, and in accordance with such Florida State Guard regulations as may be promulgated by the Governor from time to time."

The Florida State Guard is, therefore, governed by the Military Code, Chapter 250, Florida Statutes, 1941, in so far as the said code is ap-

plicable and not inconsistent with the rules and regulations of the Florida State Guard.

Section 250.47, *supra*, provides for the annual maintenance allowance to the commanding officer of the various units of command of the Florida National Guard. This allowance is for the maintenance and care of property entrusted to them, however, the expending of such allowance money is governed by such rules and regulations as may be prescribed in the regulations for the Florida National Guard. (Paragraph 3, Section 250.47, *supra*) General Orders No. 13 issued under date of August 30, 1927, by Brigadier General J. Clifford Foster, the adjutant general, is such a rule and regulation and provided therein is this provision:

"Disbursements: The term 'For the maintenance of such organizations' shall be understood to limit disbursements to such purposes as are specifically authorized under these regulations, and such other purposes only as may be specifically authorized from time to time by the Adjutant General. No disbursement will be ordered by a commanding officer which is not authorized under these regulations, or for which authority has not been obtained by application to the office of The Adjutant General." (Emphasis supplied).

It is not possible to give a definite answer to your question for the reason that the company commander is responsible only in case of failure to exercise faithful care and safekeeping of the property. In other words, all of the material facts surrounding the missing of each and every article would have to be determined before ruling on the negligence of the officer. The adjutant general advises me that when similar situations arise in the Florida National Guard that they conduct a survey, making a full report of all the facts surrounding the missing articles; that some of the surveys are approved while others are disapproved.

It is my opinion that under the provisions of Section 251.02 and Section 251.15, Florida Statutes, 1941, which provides

"The expenses incurred in carrying out the provisions of this chapter shall be paid from the fund for current expenses of the Military Department, by whatever name or title such fund shall be known and designated, upon requisition of the Adjutant General, approved by the Governor",

that this problem can be solved by modification of the Florida State Guard rules to provide for reimbursement to the Federal Government for such missing property.

CHAPTER XIV

PUBLIC LANDS AND PROPERTY

INTERNAL IMPROVEMENT FUND

June 18, 1946.—046-262.

BUILDING FUND ACT—SURPLUS

QUESTIONS: (a) Do the provisions of Chapter 22820, Acts of 1945, in any way apply to moneys in the hands of Trustees of the Internal Improvement Fund?

(b) What is the meaning of the word or term "balance" as used in said Building Fund Act?

(c) As of what time in the fiscal year of the state's budgeting, and appropriation consumption, is this balance as described in said Building Fund Act, to be determined?

(d) Can the legislature properly and constitutionally delegate its legislative power of making appropriations, in the manner in which this appears to have been done in the Building Fund Act, with respect to the expenditure of the building fund amounts, upon the State Budget Commission.

(e) Can the legislature constitutionally make appropriations in the manner in which this is attempted in this Building Fund Act, that is, provide for the appropriation without designating the the fund from which it is to be paid, and without limitation in amount; and upon an attempt to appropriate in the manner that such is done in the act in question, is the same a valid appropriation in law and in fact?

(f) Can the legislature, as is done in this Building Fund Act, appropriate all surplus funds and balances of all state departments, etc., without specifying amounts or specific purposes and leaving an intervening administrative board to supply such omissions?

(g) Doesn't the building fund in question leave to the Budget Commission the authority of selecting where and how and in what amount state moneys are to be spent without appropriate legislative appropriation therefor?

(h) Whether or not the facts recited in the resolution of the State Budget Commission are sufficiently proven by such recitals; and if not, do they actually exist as so recited?

To Honorable J. M. Lee, State Comptroller:

I regret my inability to construe this Building Fund Act, in the light of the resolution submitted to you and embraced in the purview of this opinion, in a definite and final manner so as to, by such construction, tell you what I think the law of the Building Fund Act is as applicable to the provisions of the resolution so that your duty might be definitely pointed out to you in the premises. But this inability is not on account of unwillingness to make the appropriate and adequate legal research for rendering a final opinion, nor is it due to inability to reach a conclusion regarding the law involved.

I have formulated in my own mind a definite opinion regarding the application of this law and its interpretation with respect to the duties devolving upon you thereunder in the light of the facts arising, but two of my assistants have taken contrary views and reached opposite opinions

with respect to the law in question and its application and interpretation, and both of these views are sufficiently well grounded, I think, to find adherents in and from competent legal thinkers and exponents,—hence I am advising you to submit the matter to the court.

For your better information in support of the opinion that I am rendering you, I enclose herewith copy of the memorandums prepared for me by these two assistant attorneys general in which each has briefed his research and conclusion so referred to.

Under date of March 18, 1946, I rendered you an opinion on the use of Internal Improvement Funds for state buildings. I enclose a copy of this opinion also.

It is my opinion, therefore, that you should sign no warrant against any funds transferred to the state treasury and to the state general building fund from Internal Improvement Board funds until the legal questions involved and pointed out in this opinion have been submitted to and finally passed upon by the proper court.

May 28, 1946.—046-232.

TRANSFER OF OIL/GAS FUND—UNUSED PORTION

QUESTION: Is it lawful for Trustees of the Internal Improvement Fund, to order that all funds under the account designated "TRUSTEES INTERNAL IMPROVEMENT FUND—PETROLEUM OIL AND/OR GAS EXPLORATION FUND UNDER CHAPTER 20667, Acts of 1941—J. Edwin Larson, Treasurer," be transferred to the account designated "TRUSTEES INTERNAL IMPROVEMENT FUND UNDER CHAPTER 610—J. Edwin Larson, Treasurer," and for the comptroller to make this transfer?

To Honorable J. M. Lee, State Comptroller:

That part of Chapter 610 of the Laws of 1854-55, which has been incorporated in the Florida Statutes Annotated, 1941, is Sections 253.01, 253.02, 253.18 and 253.19.

Section 253.01, Florida Statutes Annotated, seems to be the only section applicable to your question and says so much of the five hundred thousand acres of land granted to the state for internal improvement purposes and all proceeds that might accrue from the sale of said lands and all swamp and overflowed lands granted to Florida by act of Congress approved September 28, 1850, together with all the proceeds accrued or thereafter accruing from the sale of such lands, is placed in a fund to be known as the Internal Improvement Fund of the State of Florida.

Section 253.49, Florida Statutes, 1941, sets up a fund called the Petroleum Oil and/or Gas Exploration Fund, which was to be used for a bonus of fifty thousand dollars "and other lawful purposes." "Other lawful purposes" in my opinion mean purposes which must be designated by law, that is, by the legislature. Since this money was so placed in this special fund by the legislature and thus earmarked, in my opinion it will require valid legislative action to remove the money from this fund. None of the money in this Petroleum, Oil and/or Gas Exploration Fund goes to the Trustees of the Internal Improvement Fund as does the money derived from sales under said Section 253.01.

In my opinion, therefore, the attempted transfer by the Trustees of the money from the Petroleum Oil and/or Gas Exploration Fund to the Trustees of the Internal Improvement Fund is without legal authority and it is not lawful for you to make the transfer.

August 10, 1945.—045-231.

CONTRACT WITH OIL EXPLORATIONS, INC.

QUESTION: Is the exploration contract between the Trustees of the Internal Improvement Fund and "A" Oil Explorations, Inc., being No. 224,

and resolution adopted December 27, 1944, a binding obligation on the board to give lease covering the area south of the south line of Pasco county?

To the Trustees of the Internal Improvement Fund:

On the 26th day of October, 1943, I rendered you an opinion on this said contract No. 224, and in that opinion I stated to you that "A" Oil Explorations, Inc. was in default under the said contract and that all of its rights thereunder had terminated. I do not see where the resolution adopted December 27, 1944, would change this opinion.

It is still my opinion that "A" Oil Explorations, Inc. is in default under said Contract No. 224 and all of its rights thereunder have terminated, and you are not required to give the said "A" Oil Explorations, Inc. a lease over the property above described, being that area south of the south line of Pasco county.

June 14, 1946.—046-260.

VETERANS—HOMESTEAD OF PUBLIC LANDS

QUESTION: How is citizenship and residence acquired by a non-resident veteran of World War II who desires to homestead certain wild and vacant public lands, as authorized by Chapter 22860, Acts of 1945?

To Honorable F. C. Elliot, Secretary and Engineer, Trustees of the Internal Improvement Fund:

You are advised that the Supreme Court of Florida has held that when the terms "residence," "residing," or equivalent terms are used in statutes, or actions, or suits relating to taxation, right of suffrage, divorce, limitations of actions, and the like, they are used in the sense of "legal residence," that is, the place of domicile or permanent abode, as distinguished from temporary residence. It has further held that citizens of the State of Florida are those persons who are born or naturalized in the United States, and subject to the jurisdiction thereof, and who reside in the State of Florida.

In my opinion, therefore, when an honorably discharged veteran of the armed services of the United States during World War II, born in this country or naturalized, who removes to the State of Florida for the purpose and with the intent of becoming permanently domiciled, he or she, thereupon, becomes a citizen and resident of the State of Florida within the terms of Chapter 22860, 1945.

In an effort to ascertain the status of a former nonresident it would seem well for the Trustees of the Internal Improvement Fund either to require a sworn statement as provided for in Chapter 20412, 1941, where applicable, or to require a statement or affidavit of intention of becoming permanently domiciled in this state and removing from the state where former citizenship was enjoyed, and the same to include any other available facts as would support that intention such as resigning a former position, disposing of a home or other property, releasing an apartment, moving family and household goods to this state, etc.

May 27, 1946.—046-231.

VETERANS—HOMESTEADS—TIME OF OCCUPANCY

QUESTION: An honorably discharged veteran of the armed services of the United States during World War II desires to homestead state lands. If he does this, will he be given credit on the requirement for occupancy of the time spent by him in the armed services?

To Mr. Hilliard Allen, Service Officer, Hernando County, Veteran's Service, Brooksville, Florida:

For all practical intents and purposes Chapter 22860, Laws of Florida, 1945, is the only law applicable. Section 253.25, Florida Statutes, 1941, refers to homesteading of forfeited lands under Section 253.24, but I am informed that there is no such land available for homesteading and has not been for many years.

Said Chapter 22860 makes no provision for granting to the said veteran any credit for time spent by him in the armed services (see section 4 thereof).

In the absence of such law, it is my opinion that your question should be answered in the negative.

August 22, 1945.—045-267.

WAR VETERANS—LANDS FOR HOMESTEAD PURPOSES

QUESTION: Does Chapter 22860, Acts of 1945, provide what means a veteran shall use to locate lands for homestead purposes?

To Honorable Nathan Mayo, Commissioner of Agriculture:

This act is one authorizing honorably discharged veterans of World War II to homestead certain wild and vacant lands, title to which is vested in the state or any of its departments or agencies. Any county, by resolution of its board of county commissioners, may for the same purpose open up any wild and vacant lands owned by the county.

A careful examination of the act does not indicate how lands are to be located, but it is my belief that the most practicable means possible should be employed by the veteran, and perhaps the simplest plan would be for the veteran to ascertain from the local county officials and individuals information as to the wild and vacant lands owned by the state, or the county, in a chosen county.

Because of the expensive, broad and lengthy undertaking that would be involved should the trustees attempt to examine and analyze for veteran homestead purposes the volume of state lands, I do not believe the legislature intended the trustees to engage in such a venture.

It would seem, as a matter of fact, that the legislature intended the veteran to examine the lands for suitability in the county of his selection by the provisions of the act requiring the trustees to place forms for notice of intention to homestead in the custody of the clerk of the circuit court of each county of the state. Collaboration by the trustees in these searches should be given, however, where the same may be done in a practical and helpful manner.

January 14, 1946.—046-13.

HOMESTEADING BY WAR VETERANS

QUESTION: May a board of county commissioners open up for homesteading by veterans of World War II certain lands which were, during the "1925 boom," subdivided into lots and blocks and upon which no sidewalks or streets have been laid?

To Messrs. Evans & Glenn, Attorneys for the Board of County Commissioners, Sarasota County, Sarasota, Florida:

It is assumed that no one is in possession of said property, or any part thereof; that no improvements of any kind have been made thereon and that the county owns same.

Assuming the facts in the question to be correct as well as the assumptions I make, I would say that the property can be classified as "wild and vacant public lands" which your county can open up for such homesteading under the above said chapter 22860, Laws of Florida, 1945.

August 10, 1945.—045-232.

STATE—OIL INTEREST IN MURPHY LAND

QUESTION: Will the state lease 50 per cent retained oil interest in the so-called Murphy land?

To the Trustees of the Internal Improvement Fund:

In my opinion, the state cannot lease the 50 per cent retained oil interest, but it has given to parties working agreements relative thereto, with the right and privilege of investigating, exploring, prospecting, drilling and mining for the production of oil and gas, the state reserving for itself one-eighth of the said one-half of the petroleum produced and saved from said land.

The parties so given the right under said working agreement are required to present satisfactory evidence to you that they are the owners or have acquired from the owners of the said land leases or contracts granting them the exclusive right to investigate, explore, prospect, drill and mine for oil, gas and other minerals on said land. The working agreement is for a term of five years but drilling operations must commence within one year from date thereof.

I trust this answers your inquiry.

September 15, 1945.—045-300.

TITLE TO SUBMERGED LANDS

QUESTION: Does an upland owner obtain title to abutting submerged land by filling it in?

To Honorable Nathan Mayo, Commissioner of Agriculture:

The question continued to arise because of the language of Section 271.01, Florida Statutes, 1941, which states in part that the State of Florida divests itself of title to submerged land in front of land owned by any person lying upon any navigable stream or bay of the sea or harbor, if said submerged land is filled in continuously from high water mark in the direction of the channel.

Section 271.01 above is Section 1 of Chapter 8537, Acts of 1921, and is also known as the Butler Act. Section 9 of the Butler Act, however, reads as follows:

"Nothing in this Act contained shall affect or repeal Sections 1056, 1057, 1058, 1059, 1060, 1061, 1062, 1063, 1064 of the Revised General Statutes of Florida." (Emphasis supplied).

Sections 1061 and 1062 are now 253.12 and 253.13, Florida Statutes, 1941, and the former invests the title to certain types of land in the Trustees of the Internal Improvement Fund. Embraced among these are "sand bars and shallow banks along the shores of the mainland." Section 253.13 gives the trustees authority to dispose of these lands.

Although the phraseology of Section 271.01 is broad in its terms, it is seen that the title to the very lands it refers to, is, under Sections 253.12 and 253.13, in the trustees to be disposed of by them at such prices and terms as they see fit.

I have heretofore held that the only effect of the Butler Act is to provide statutory riparian rights to the upland owners whose title extends to the high water mark (see *Thieson v. Gulf, F. & A. Ry. Co.*, 78 So. 491), and that the lands between the high water mark and the channel cannot be divested from the state by filling 'in.

August 17, 1945.—045-248.

RIGHTS—UPLAND OWNERS

QUESTIONS: 1. Do the trustees own spoil-deposit area between the upland and channel of bay, said area formerly being submerged land?

2. May upland owners be deprived of riparian rights which would have permitted them to object to the sale of sovereignty land?

To Honorable Nathan Mayo, Commissioner of Agriculture:

An inspection of the file accompanying your letter reflects that a rectangular-shaped (for the purpose of this opinion) piece of land is bounded by the Gulf of Mexico on the west and Roberts Bay on the east; that originally the west third of the rectangle was high land and was divided into lots, each fronting on the Gulf; and that later the east third, formerly mangrove marshland, was filled in and became high land. The middle third remains covered by mangrove and is subject to the daily ebb and flow of the tide. The lots facing on the Gulf extend inward or eastward about 350 feet, the middle third, mangrove covered, is about 300 feet west to east; and the filled-in area, bordering on the bay, which is navigable, is about 325 feet west to east.

The file indicates that a corporation owned at least some, if not all, of the Gulf lots in 1926, and that the same were included with other properties then under development by the corporation in 1926 which, as an incidental part of its development work, was engaged at that time in the filling of the mangrove swamp or submerged land lying east of the Gulf lots, using spoil dredged from a proposed yacht basin located to the southeast of the rectangle above described. The corporation later disposed of the Gulf lots and is apparently non-extant as far as the question before us is concerned.

It is also revealed that an application was filed in 1945 to purchase the filled-in or former sovereignty land, and that the Trustees of the Internal Improvement Fund advertised the sale of the land for "objections" pursuant to Section 253.13, Florida Statutes, 1941. Objections were filed by the present owners of the Gulf lots upon the ground that the sale would interfere with their eastern riparian rights.

Assuming that the east end of the Gulf lots abutted on the mangrove marshland, it would seem admitted that the lot owners originally had riparian rights over the mangrove area east to the channel of the bay, and it might be claimed that the corporation, in the light of Section 271.01, by filling in the east end of the aforesaid rectangle thereby obtained title to the submerged land; however, former opinions of this office have held that, without purchase of such submerged land from the trustees, no title passed. The basis for these opinions has been that the Riparian Act of 1921 (also known as the Butler Act and now Section 271.01) excepted from its provisions Sections 253.06-15 which vested in the trustees the title to certain submerged lands, similar to the lands herein, said excepted sections provided for title to pass only upon sale by the trustees.

This position is supported by the case of *Caples v. Taliaferro*, 196 So. 861, which inferred that Section 253.12, one of the excepted sections, embraced the shallow submerged area near the shore; accordingly, title to the mangrove marsh, it would seem, could only have been obtained by purchase from the trustees and not by filling in as by the action of the corporation above.

The first question is answered in the affirmative.

Considering the second question, if the corporation obtained no title to the submerged land by the act of filling it in, said operation being in connection with the yacht basin plan, the conclusion is reached that it deprived itself of what riparian rights are given by the 1921 Riparian Act and subsequent owners of the Gulf lots acquired no riparian rights. There is nothing to indicate either that the various owners of the lots since 1926, the date of the fill deposit, took any steps to perfect any legal rights which might have obtained in them and, consequently, they lost their riparian claims. *Bridgehead Land Company v. Hale*, 199 So. 361; *Freed v. Miami Beach Pier Corporation*, 112 So. 841.

There is another fact which is important in the examination of this matter. In 1931 or 1932 the City of Venice and the County of Sarasota appear to have cooperated in placing a road, running north and south across the west side of the filled or sovereignty land. The riparian rights of an abutting owner depend on his land touching the water and, if the fee in a road separating his land from the water is in the public, abutting owners have no riparian rights (*Caples v. Taliaferro*, *supra*). It can not be gainsaid that the fee to the north and south road, crossing sovereignty land, is not in the public. Thus, physically, since the fill in 1926 and the road in 1931-1932, the lot owners' riparian rights to the east have ceased to exist.

It is noteworthy also that the tax assessor apparently considered this land owned by the state and did not assess it; nor did anyone, including the Gulf lot owners, return the same for taxation, pay taxes on it or improve it since it was filled in.

It is my opinion that the title to the spoil area remains vested in the trustees and that riparian rights on the east no longer continue that would enable the lot owners, under Section 253.13, to object to the sale of these lands by the trustees.

March 18, 1946.—046-104.

USE FOR STATE BUILDINGS

QUESTION: May Internal Improvement Funds, derived from the sale of swamp and overflowed lands, be covered into the state building fund, to become a part thereof for use in providing suitable housing accommodations for state agencies, upon direction of the State Budget Commission, with the approval of the governor?

To Honorable J. M. Lee, State Comptroller:

Under the provisions of Chapter 22820, Laws of Florida, Acts of 1945, the State Budget Commission is authorized and directed to examine into the several funds of the state and of its boards, agencies and commissions, for the purpose of ascertaining whether or not there may be any surplus or balance in any such funds that may be used for other purposes "without interfering with the operations thereof and their normal services to the public." When the said budget commission ascertains any such surplus or balance it may, by and with the consent of the governor, "cover the same into the state building fund to become a part thereof." If moneys, other than and in addition to those appropriated by said Chapter 22820, "shall be available to become a part of the state building fund, such moneys are authorized to be deposited in said fund to become a part thereof," which funds are appropriated by said chapter for state building purposes.

The Internal Improvement Fund of this state was established by Chapter 610, Laws of Florida, Acts of 1855, and declared to be "a separate and distinct fund," to be strictly applied according to the terms

and conditions of said chapter. The said fund was, by said law, also declared to have been "irrevocably vested in five trustees"; that is, the Trustees of the Internal Improvement Fund, **to be held for the uses and purposes provided in said Act of 1855, and now as provided in Chapter 253, Florida Statutes, 1941.**

Most of the property and funds now vested in the Internal Improvement Fund under the Act of 1855 are funds derived from the sale of swamp and overflowed lands, which lands came to the State of Florida under the terms of the Swamp Land Act of 1850, which act provided that "the proceeds of said lands, whether from sale or direct appropriation in kind, shall be applied, **exclusively**, as far as necessary, to the purpose of reclaiming said lands by means of levees and drains."

It has been held that the legislative power to appropriate money from the treasury of the state cannot be delegated (16 C. J. S. 339, Section 133, note 11). It is also a doctrine well established and frequently reiterated by the court that functions of the legislature must be exercised by it alone and cannot be delegated (12 C. J. 839, Section 323; 16 C. J. S. 337, 339, Section 133). There is some indication in the concurring opinion in *State v. Green*, 95 Fla. 117, 116 So. 66, that the legislature has no power to write an act for an appropriation, leaving the amount blank, to be handed over to some board or commission to fill in the amount of the appropriation.

Under certain statutes and laws of this state the Internal Improvement Fund of this state has been earmarked for the payment of drainage projects which may be conducted by the Trustees or the Drainage Commissioners (Sections 253.30 et seq., Florida Statutes, 1941), for paying general drainage assessments against state lands (Section 298.36), for county roads (Sections 345.01 et seq.), for paying Everglades drainage assessments against state lands (Section 9, Chapter 20658, 1941), and for paying drainage assessments levied against state land by drainage districts organized by special acts, most of which provide for payment of their assessments against state lands from the Internal Improvement Fund. In the light of these facts, it would seem that there is no surplus in the Internal Improvement Fund that will not be needed to meet the above obligations and to take funds therefrom might interfere with the operations thereof and the normal services of the fund to the public.

Because of the past history of the Internal Improvement Fund, I entertain grave doubt as to whether or not Chapter 22820, Acts of 1945, was intended to extend to said fund.

In the light of the above and foregoing facts and circumstances, I am of the opinion that the above question should be answered in the negative. You are, therefore, advised that these trust funds may not be lawfully deposited in the building fund, as provided by the authorization of the budget commission mentioned in your request for opinion.

PUBLIC PROPERTY AND PUBLIC BUILDINGS

May 14, 1946.—046-200.

NONSECTARIAN SCHOOL—DONATION OF LAND

QUESTION: Where a county has acquired certain real property through taxation and foreclosure, under the taxing laws of this state, may it donate a part of that real property to a nonsectarian school for boys operated within that county?

To Honorable John H. Treadwell, Jr., County Attorney, Arcadia, Florida:

I have been unable to find any statutory or constitutional provision authorizing the conveyance of real estate by a county, as a donation, to a nonsectarian school. In the absence of statutory authority, county com-

missioners do not have power to dispose of real estate (*Gessner v. Del-Air Corporation*, 154 Fla. 829, 17 So. 2d. 522).

The above question must be answered in the negative.

STATE LIBRARY

August 7, 1946.—046-340.

BOOK FINES—DISPOSITION OF FUNDS

QUESTION: May any part of the moneys received from fines or from repayment by the borrower of the value of books lost, when deposited in the state treasury, be considered a refund of expense and again used for any lawful expenditure of the board?

To Mr. W. T. Cash, State Librarian:

Moneys collected from fines represent penalties and rental value for overdue books. Such money is not a refund of expense; it has more of the nature of income or revenue and there appears to be no legislative authority for its expenditure when collected, as pointed out in my two earlier opinions mentioned above.

On the other hand, the legislature has provided funds for the purchase of books by the library in the appropriation for necessary and regular expenses of the agency and it would appear, therefore, that replacement of a book lost should be classed an expense; and since the patron who lost the book makes refund of its value it is my opinion that when such money has been collected and deposited in the state treasury it is in effect a refund of expense and may be used for any lawful expenditure of the agency in addition to the total amount appropriated by the legislature for necessary and regular expense of your agency.

December 8, 1945.—045-381.

BOARD—DEPOSIT OF FUNDS IN STATE TREASURY

QUESTIONS: 1. Do the provisions of Section 2, Chapter 22833, Law of 1945, apply to the State Library Board?

2. If the State Library Board deposits in the state treasury funds received from occasional sales of duplicate books, and from fines and fees, in what manner may such funds be withdrawn from the treasury?

To the State Library Board, Tallahassee, Florida:

It is my opinion that the Five Funds Act, Chapter 22833, Laws of 1945, applies to the State Library Board, and the funds received by the library from sales of duplicate books and from fines and fees must be deposited in the state treasury. This is in answer to your first question.

I find nothing in the statutes which can be construed as an appropriation of such funds so deposited. If such funds should actually be needed in order to enable the State Library Board to properly perform its duties and functions, an appropriate petition might be filed with the State Budget Commission, and after public hearing the Commission would have authority to release funds available for that purpose. It would probably be a simple matter to obtain legislative authority at the next session of the legislature for the expenditure of such funds.

STATE PARKS

August 19, 1946.—046-352.

ROYAL PALM STATE PARK—DISBURSAL OF FUNDS

QUESTION: In the light of the Five Funds Act should the funds appropriated by Section 258.13 of the Acts of 1941 and by Section 1, Item

46-c of Chapter 22827, Acts of 1945 (General Appropriation Act) be disbursed, (1) To the Florida Federation of Women's Clubs in lump sum, or, (2) on the requisition of the Florida Federation of Women's Clubs in the usual manner of disbursing funds in the state treasury, or (3) in lump sum to the Florida Federation of Women's Clubs by way of reimbursement to them for expenses of this project paid from their own funds, upon their showing of disbursement with cancelled checks and paid receipts attached?

To Honorable J. M. Lee, State Comptroller:

You explain that heretofore the appropriation made by Section 258.13 has been paid each year in lump sum to the treasurer of the Florida Federation of Women's Clubs and that thereafter the federation has annually made a report of its disbursement of such funds.

Section 258.13 makes an annual appropriation of \$2500 "To the Florida Federation of Women's Clubs, to be expended and used by it exclusively in the development, improvement and maintenance of the Royal Palm State Park, its buildings and grounds and payment therefor. . ." Chapter 22827, Section 1, Item 46-c appropriates \$2,000 for the same purpose in the following manner: "Royal Palm State Park (supplementing Section 258.13)."

The reference to the Five Funds Act is more particularly directed to the last sentence in Section 6 of that chapter which reads as follows:

"In those instances where the expenditure of funds of regulatory boards or commissions has been provided for by laws other than the biennial appropriation bill, warrants shall issue upon requisition to the state comptroller by the governing body of such board or commission."

It will be noted that most of the statutes appropriating money for the maintenance of parks, memorials, monuments, etc., specifically provide, in one way or another, for lump sum disbursement to the association, board or commission responsible for the maintenance of such memorial, park or monument and the board or commission or other body receiving the disbursement then applies the same toward the cost of maintenance.

The title to the lands of the Royal Palm State Park is vested in the Florida Federation of Women's Clubs, having been ceded to that federation by the state; and the park is operated, conducted and controlled by the federation. Neither the Royal Palm State Park nor the Florida Federation of Women's Clubs is a regulatory board or commission within the meaning of the Five Funds Act and the quoted provision has no reference to the funds involved in your inquiry. The appropriation is in the nature of a contribution by the state to the Florida Federation of Women's Clubs to assist in the maintenance of the park for the benefit of the general public.

It is my opinion that it was the intention of the legislature, in Section 258.13, to authorize a lump sum disbursement to the federation of the money appropriated by that section. The appropriation in the 1945 General Appropriation Act was simply an additional amount allowed for the same purpose and, together with the appropriation of Section 258.13, should be disbursed in the same manner as you have heretofore disbursed the funds provided by the latter section. This opinion is restricted to the appropriations mentioned in your question.

EVERGLADES NATIONAL PARK

August 23, 1945.—045-258.

TRUSTEES OF THE INTERNAL IMPROVEMENT FUND—AUTHORITY

QUESTION: What authority have the Trustees of the Internal Improvement Fund in respect to Everglades National Park?

To Honorable Millard F. Caldwell, Governor:

Reference is made to the letter from Mr. "C" Coordinating Superintendent, National Park Service, United States Department of the Interior, St. Augustine, Florida, posing eight questions concerning laws relating to the Everglades National Park Commission and the relationship of the Commission with the Trustees of the Internal Improvement Fund of the State of Florida, which letter was transmitted by you with the request for an opinion on such questions.

Four of Mr. "C's" questions, namely, 2, 3, 7 and 8, are not in reality legal in their character but pertain to matters of policy and appear to me to be within the province of the legislature. All of his questions are to some extent abstract and are apparently propounded on the assumption that one of the prime responsibilities of the Trustees of the Internal Improvement Fund is to acquire land for the park.

It is clear that the legislature could have given to the trustees the same powers in developing the park that it gave to the commission but it did not see fit to do so and instead created the commission and gave to the commission the powers it considered necessary for the fulfillment of the purpose of such creation. As you know, the primary function of the trustees is not the acquisition of additional lands but to administer to the best interests of the state the Internal Improvement Fund of the State of Florida.

In view of the foregoing, it seems to me that no useful purpose will be served by answering individually and in detail the questions of Mr. "C."

* It is the purpose of Section 264.09, Florida Statutes, 1941, to authorize the trustees, in their discretion, to convey to the United States, with certain reservations and restrictions enumerated therein, timely for inclusion in the park, all lands in Dade, Monroe and Collier counties held by the trustees within the boundaries of the park.

The 1945 Legislature, through Chapter 22776, undertook to authorize the trustees, in their discretion, to exchange lands located outside the park and held by the trustees by virtue of the Swamp Land Grant Act of 1850 for lands privately owned within the park and in turn to convey the lands so acquired, with certain specified restrictions, to the United States. Section 264.10, Florida Statutes, 1941, originally enacted as Section 2, Chapter 16995, Laws of Florida, 1935, was similar to Chapter 22776, *supra*, except that the trustees were limited to the exchange of swamp lands situated south of Township 48 South. (Chapter 22776, *supra*, is an effort to amend Chapter 16995, *supra*, an act of the 1935 Legislature, rather than Section 264.10, Florida Statutes, 1941, which statutes are a revision of the general laws of this state and adopted by the 1941 Legislature as the statute laws of this state, and I do not undertake here to pass upon the validity of such an amendment).

The object of Section 264.15, 1943 Supplement to Volume I, Florida Statutes, 1941, is to authorize the trustees, in their discretion, to convey, on behalf of the State of Florida, to the United States, with certain reservations and restrictions therein specified, for inclusion in the park, all lands in Dade, Monroe and Collier counties held by the trustees under Chapter 18296, Laws of Florida, 1937 (Murphy Act), lying within the boundaries of the park.

The laws referred to in the three preceding paragraphs are the only laws whereby the legislature has given to the trustees specific authority with respect to the park and such laws, when considered with those relating to the authority of the commission, seem to indicate that the legislature intended thereby only to empower the trustees to assist in a limited way in the development of the park and that the principal responsibility of such development should be in the commission.

PUBLIC LANDS

January 22, 1945.—045-15.

CONVEYANCE TO COUNTIES—RESERVATION OF OIL AND MINERAL RIGHTS

QUESTION: Are the Trustees of the Internal Improvement Fund authorized to convey, to the various counties, land, the title to which vested in the trustees under Chapter 14572, Acts of 1929, and in such conveyances reserve mineral and oil rights?

To Honorable F. C. Elliot, Secretary, Trustees of the Internal Improvement Fund:

The title to the lands under consideration vested in the Trustees of the Internal Improvement Fund by virtue of Chapter 14572, Acts of 1929, Section 24 thereof providing that in case of a sale under final decree in any action commenced by the state to foreclose the lien of a certificate of tax sale or tax deed issued to the State of Florida, and no one bidding a sufficient sum to pay the full amount of the decree, interest thereon, and subsequent costs, the land shall be sold to the trustees for said amounts and deed made to the said trustees.

Section 25 of said chapter permits the trustees to hold and dispose of any such lands as provided by law with respect to other lands belonging to the Internal Improvement Fund.

The above sections of Chapter 14572, together with other sections, were repealed by Chapter 17442, Acts of 1935. However, nothing contained in this latter act was to be construed as in any way affecting any suit then pending in any court of this state for the foreclosure of any tax certificates or tax deeds. An investigation has been made in the trustees' office and it has been determined that all foreclosure suits authorized by Chapter 14572 and by which the trustees became possessed of this land, were either concluded or pending at the time Chapter 17442 became a law.

Under the provision that the trustees may hold or dispose of these lands, as provided by law, with respect to other lands belonging to the Internal Improvement Fund, it is my belief that the trustees are required to reserve in conveyances thereof the mineral and oil rights as provided by Section 270.11, Florida Statutes, 1941.

It is further my opinion that this property may be conveyed to the various counties for the purposes for which counties are authorized to receive the title to land.

April 6, 1945.—045-85.

RESERVATION OF MINERAL AND PETROLEUM RIGHTS

QUESTION: Did the legislature intend the reservation of mineral and petroleum rights to apply to lands vested in the trustees under the provisions of Chapter 14572, Acts of 1929?

To Honorable Nathan Mayo, Commissioner of Agriculture:

In another opinion of recent date this question, in addition to the main question, was considered and answered in the affirmative. However, for the reason that it was not discussed fully, you will find a more complete discussion herein.

An examination of Chapter 14572, Acts of 1929, will show that at sale under final decree in an action to foreclose the tax sale certificates and deeds held by the state and there not being a sufficient bid, the land

shall be sold to the Trustees of the Internal Improvement Fund. As to the manner of disposition of these lands, Section 25 contains this unequivocal language:

"The Trustees of the Internal Improvement Fund may hold and dispose of any such lands as provided by law with respect to other lands belonging to the Internal Improvement Fund."
(Emphasis supplied).

It would seem from the above that if the trustees and the board of Education must, according to Section 270.11, Florida Statutes, 1941, make reservations "in all contracts and all deeds for the sale of lands," executed by them, then such reservations must be made in the disposition of lands coming to the trustees under Chapter 14572, Acts of 1929.

Whether the legislature had tax-foreclosed lands in mind when it passed Chapter 6159, Acts of 1911, now Section 270.11, may be determined by an inspection of this and a prior act. In 1909 the legislature passed Chapter 5943, now Section 270.08, which provided as follows:

"Sec. 2. That hereafter, when the Trustees of the Internal Improvement Fund or the State Board of Education shall decide or regard it expedient to sell any of the lands that are now, or may hereafter be, vested in the Trustees of the Internal Improvement Fund of the State of Florida or in the State Board of Education they shall give thirty days' notice of such sale, by publication in some newspaper published in the county or counties where such lands to be sold are situated, and also in a newspaper published at Tallahassee, Florida, and such other papers as may be deemed advisable, once each week;" etc. (Emphasis supplied).

You will notice the emphasized words which indicate that the legislature contemplated and believed other lands **would be** vested in the trustees from time to time. Two years later the mineral and oil reservation law, being Chapter 6159, Acts of 1911, now Section 270.11, provided that:

"In all contracts for sale and all deeds for the sale of lands, executed by the Trustees of the Internal Improvement Fund of the State of Florida, and the State Board of Education of the State of Florida, there shall be reserved . . ." etc.

Because this 1911 mineral reservation act followed the 1909 act so closely, it is my belief, and the presumption is very strong, that the legislature of 1911 was mindful of, intended to, and did refer solely and directly to the present and future lands spoken of in the 1909 act which, it will be remembered, included "lands that are now, or may hereafter be, vested in the trustees . . ." Thus, in my opinion, there was an intention to reserve oil and minerals in all lands vested and to be vested in the trustees and such would include the lands vesting in the trustees through Chapter 14572.

In addition to the above reasoning, your attention is called to the fact that the legislature re-enacted the law as to reservations three times, 1939, 1941 and 1943, since the date the land under Chapter 14572 came to the trustees. Presuming that the legislature is cognizant of the types of land vested in the Trustees of the Internal Improvement Fund, by repeating this legislation after the land vested in the trustees, they indicated that they intended the law to apply to such land.

Any opinion of this office in conflict with this holding is revoked.

March 26, 1945.—045-78.

SUBMERGED LANDS—SALE

QUESTION: What authority do the Trustees of the Internal Improvement Fund have to sell certain submerged lands in Biscayne Bay for the purpose of creating four islands by pumping fill from contiguous areas?

To the Trustees of the Internal Improvement Fund:

At the present time this is a doubtful legal question, owing to the fact that even in the most recent decision of the Supreme Court of Florida (*Watson v. Holland*, 20 So. 2d. 388) the authority of the trustees to make such a sale is not clear, and the cited case is still being litigated by an application for a writ of certiorari to the Supreme Court of the United States shortly to be filed and which is based upon the question of the authority of the Trustees who represent the state, to make certain oil leases upon similarly situated submerged lands.

In addition to the foregoing, is the fact, as stated in the press, that the Secretary of the Interior is now asserting, on behalf of the United States Government, a claim that the title to these submerged lands is in the United States. Happily for us, however, the solution of this question under the existing law is dependent upon, not only the question of abstract legality, but also upon a question of public convenience.

In the case of *Watson v. Holland*, above cited, Circuit Judge Hutchinson, in the opinion on pages 390 and 391 of 20 So. 2d., sets forth certain quotations from previously decided cases that bear not only upon the question of legality but also on the question of public convenience.

Quoting from a previous case (*Deering v. Martin*, 95 Fla. 224, 116 So. 54, 64) the learned Judge sets forth the following:

"In discussing this question, this court in *Deering v. Martin*, supra, said:

" 'Section 1062 (F.S.A. § 253.13) indicates that the power vested by section 1061 (section 253.12) should not be exercised on objection made when it would interfere "with the rights granted to riparian owners by the laws of Florida, or would be a serious impediment to navigation or public fisheries." In such a case, no doubt, the board should decline to sell, even in the absence of formal objection.

" 'It is not my purpose to contend that the trust doctrine, with reference to lands under navigable waters in this state, would preclude the state from transferring to private ownership limited portions of such lands when the rights of the people of the state for which the state holds the title in trust are not invaded or impaired. And such must have been the intent of the Statute . . . ' "

The cited language presents to the trustees in the instant matter, the question of whether the power, if it exists, shall be exercised in view of what the submitted maps show and what is a matter of general knowledge of the surrounding areas. The map setting forth information from the U. S. Coast & Geodetic Survey No. 5779, dated July 18, 1935, indicates that the depth of the water in the areas where the islands are proposed to be constructed, is from 5 feet to 1 foot.

Referring to the blueprints, it appears that the five bridges and the four proposed islands will effectually blanket the Miami Beach shore from a point north of 36th Street to 59th Street. These islands, it may be presumed, will not be of great height and hence the bridges connecting them will hardly be such as to permit navigation of even the smallest of watercraft, and certainly any vessel rigged with a mast or equipped with houses of any appreciable height would be forced to go around the proposed islands in order to go from 36th Street around to 59th Street.

Referring to the foregoing language quoted from the case of *Deering v. Martin*, which says that the power vested should not be exercised on objections made, when it would interfere with the rights granted to

riparian owners, or would be a serious impediment to navigation or public fisheries, the following words seem to have been added by way of emphasis: "In such a case no doubt the board should decline to sell, even in the absence of formal objection."

I note from the correspondence file that there is a considerable volume of objections, not only on behalf of riparian owners, but on behalf of chambers of commerce and organizations representing the real estate interests, which objections seem, when the maps are considered and the proposed plan is studied, to be, to say the least of it, not without merit.

In view of the matters hereinbefore stated, it is my opinion that the board should not sell the lands as proposed or otherwise, both because of the doubt as to the legality of the sale, if made, and the effect upon riparian owners and the public generally, which seems to have been so promptly observed and so strenuously urged.

October 12, 1945.—045-322.

TAX CERTIFICATES—REDEMPTION BY TRUSTEES

QUESTION: May the trustees redeem state and county tax certificates which issued for taxes assessed on land prior to the time the title thereto vested in the trustees under Section 65, Chapter 14717, Acts of 1931?

To Honorable F. C. Elliot, Secretary, Trustees of the Internal Improvement Fund:

From an examination of your letter it appears that the title to certain lands in Section 25, Township 50 South, Range 41 East, vested in the trustees in 1932 pursuant to the settlement with the Board of Commissioners of the Everglades Drainage District; that a number of state and county tax certificates of the sales of 1928, 1931, 1933 and one of 1934 issued against said land, the ones for 1928 and 1931 having issued prior to such vestiture; and that all of these certificates were purchased by an individual on June 9, 1939.

It is my opinion that these tax certificates are covered by the language of Section 270.19, Florida Statutes, 1941, which states in substance that when the title to lands or other property vests in the state or its agency in any manner, the state or its agency may redeem any tax certificates which have issued upon such lands. As it appears, however, that the certificates were purchased under the Murphy Act, the trustees should pay no more in redemption thereof than such purchaser bid at the sale of said certificates, plus the cost of advertising and the clerk's service charge.

The one tax certificate issued in 1934 is void. The title to these lands was vested in the trustees in 1932, and they were not subject to state and county taxation in 1933.

CHAPTER XV

PUBLIC BUSINESS

MISCELLANEOUS

June 7, 1946.—046-246.

APPROPRIATION—ANNUAL

QUESTION: Is the appropriation of \$500,000.00 made by Section 12, Chapter 22827, Laws of Florida, Acts of 1945, an annual appropriation for each year of the biennium or is it a single lump sum appropriation for the biennium?

To Honorable J. M. Lee, State Comptroller:

In order to answer your question, it is necessary that we construe Section 12 of Chapter 22827, Laws of Florida, Acts of 1945, which provides as follows:

In addition to all other appropriations herein there is hereby appropriated the sum of \$500,000.00 for the purpose of supplying immediate funds for any unforeseen emergency that may arise and for the purpose of supplying additional funds to any state office, commission, department, board, bureau, institution or other agency of the state government, if the appropriations made herein are found to be insufficient to pay the necessary cost of proper administration of the duties assigned. . . (Underlining supplied).

An act of the legislature is passed as a whole and not in parts of sections, and each part or section should be construed in connection with every other part or section; in other words, all parts of the act must be read together (*Tampa & Jacksonville Railway Co. v. Catts*, 79 Fla. 235, 85 So. 364; *Amos v. Conkling*, 99 Fla. 206, 126 So. 283). In determining the intent of the legislature, we must examine the entire act (*State v. Bowden*, 112 Fla. 288, 150 So. 259). All parts of an act must be considered and harmonized so that the whole scheme of the act may be made effectual (*Chiapetta v. Jordan*, 153 Fla. 788, 16 So. 2d. 641).

By reference to the title of Chapter 22827, we find that it makes an appropriation "for the annual periods beginning July 1, 1945 and July 1, 1946." Section 2, Article IX, of the state constitution, provides in part that "the legislature shall provide for raising revenue sufficient to defray the expenses of the state . . . for each fiscal year."

The purpose of the appropriation in question is, among other things, to supplement other appropriations in the act in question, which are annual and not biennial appropriations. When we consider the above mentioned provisions, together with Sections 1, 2 and 8 of the statutes, we are convinced that the legislature made an annual appropriation and not an appropriation for a two-year period, and such is my holding.

January 17, 1945.—045-9.

CITRUS EXPERIMENT STATION INCIDENTAL FUNDS—USE

QUESTION: May the Board of Control lawfully use citrus experiment station incidental funds for the erection of a packing house and office building at the Lake Alfred Station?

To the State Board of Control:

It is my understanding that the incidental funds of the citrus experiment station represent proceeds of the sale of citrus products by the experiment station, and therefore such funds do not come from a "state or federal source."

Section 4, Chapter 22071, Acts of 1943, the General Appropriation Act, authorizes expenditure of all moneys other than funds from state or federal sources, received by institutions under the management of the Board of Control and of the Board of Commissioners of State Institutions, by those boards as the boards may direct.

It is my opinion that these funds may be lawfully used for the erection of the building mentioned.

June 18, 1946.—046-263.

COMPTROLLER—SURPLUS FUNDS—USE FOR BUILDING

QUESTION: What are the duties of the comptroller with respect to accounting and disbursement, or otherwise, in his official sphere, resultant upon passage of resolution by State Budget Commission on May 14, 1946, declaring that the State Budget Commission had made an examination into the funds of the state and appropriation balances of all state departments, boards, commissions, institutions, and other state agencies, and had ascertained and determined that there existed a surplus or balance in the several funds of the state, and said board had, upon such ascertainment and determination, set aside and made timely transfer of the said sums into the state building fund for use in providing suitable housing accommodations for the state, its several boards, etc.; the amounts and agencies involved being as follows, to wit:

1. From the general revenue fund, \$1,500,000;
 2. From the general inspection fund, \$300,000;
 3. From the incidental account of the farm colony in the general revenue fund, \$40,753;
 4. From the Agricultural Experiment Station account in the general revenue fund on the 26th day of February 1946, \$16,000;
 5. From the state hospital special maintenance account in the general revenue fund, \$97,988;
 6. From the agricultural experiment station account in the general revenue fund on the 5th day of March 1946, \$2,000;
 7. From the general revenue fund, \$2,000,000;
- which resolution provides, among other things, that the comptroller is authorized and directed to account for the sums of moneys so transferred, as belonging to the said state building fund; that he set them up on his books as debited against the several accounts above enumerated, and credit to such building fund the same and recognize and hold the said funds subject to the drawing of warrants against the same on appropriate vouchers?

To Honorable J. M. Lee, State Comptroller:

After carefully considering the resolution referred to in the above caption, and carefully examining the specific law to which it relates, to wit, the building fund act, being Chapter 22820, Acts of 1945, and making careful research into the legal responsibilities devolving upon you as comptroller of this state, giving, at the same time, full consideration to all the provisions of the resolution that were passed by the budget commission in the light of the commission's authority thereunto, it is my opinion that your official duties under this resolution would be as follows:

1. Do not carry the records of your accounts in your office with respect to the various transfers mentioned in said resolution making up the state building fund as you are directed to do under Chapter 22820, Acts of 1945; nor as you are directed to do in said resolution, that involve the questions of law with respect to such transfer as are hereinafter set forth; and in the instance of the particular resolution now being dealt with, all of the transfers mentioned in it involve such questions, with the exception of item 2, above, a transfer of \$300,000 from the general inspection fund.

2. Do not carry records recognizing the transfers in said resolution mentioned, to wit:

- a. From the general revenue fund, \$1,500,000;
- b. From the incidental account of the farm colony in the general revenue fund, \$40,753;
- c. From the agricultural experiment station account in the general revenue fund on the 26th day of February, 1945, \$16,000;
- d. From the state hospital special maintenance account in the general revenue fund, \$97,988;
- e. From the agricultural experiment station account in the general revenue fund on the 5th day of March 1946, \$2,000;
- f. From the general revenue fund, \$2,000,000;

and do not pay out any moneys over your official signature or issue warrants under your official signature for the payment of such moneys where the same would recognize the transfers above enumerated or recognize the building fund as legally having as a part of it the moneys which said transfers deal with and purport to make a part of said building fund.

It is my opinion that you should not keep the records, recognize the transfers, or issue warrants against the funds aforesaid to comply with said resolution pending the adjudication by a court of competent jurisdiction of the following questions of law, and mixed questions of law and fact, that I believe to be involved in your official responsibility to which the matters now under consideration relate:

1. What is the meaning of the word or term "balance" as used in said building fund act?

2. As of what time in the fiscal year of the state's budgeting, and appropriation consumption, is this balance, as described in said building fund act, to be determined?

3. Can the legislature properly and constitutionally delegate its legislative power of making appropriations, in the manner in which this appears to have been done in the building fund act, with respect to the expenditure of the building fund amounts, upon the State Budget Commission?

4. Can the legislature constitutionally make appropriations in the manner in which this is attempted in this building fund act, that is, provide for the appropriation without designating the fund from which it is to be paid, and without limitation in amounts; and upon an attempt to appropriate in the manner that such is done in the act in question, is the same a valid appropriation in law and in fact?

5. Can the legislature, as is done in this Building Fund Act, appropriate all surplus funds and balances of all state departments, etc., without specifying amounts or specific purposes and leaving an intervening administrative board to supply such omissions?

6. Doesn't the building fund in question leave to the budget commission the authority of selecting where and how and in what amount state moneys are to be spent without appropriate legislative appropriation therefor?

7. Are the facts recited in the resolution of the State Budget Commission sufficiently proven by such recitals; and if not, do they actually exist as so recited?

It is my opinion that to exercise the utmost care in the matter of the handling of public funds entrusted to your custody and to properly audit an account for the disbursement of said funds, it becomes your duty as above pointed out, and that nothing less than the decision of a court of competent jurisdiction upholding the validity and constitutionality of the legislative act in question with respect to the points of law hereinabove enumerated will justify or warrant any other official course on your part.

I regret my inability to construe this building fund act in a definite and final manner so as to tell you what I think the building fund act is as applicable to the resolution under discussion; but this inability is not on account of unwillingness to make the appropriate and adequate legal research for rendering a final opinion, nor is it due to inability to reach a conclusion regarding the law involved.

I have formulated in my own mind a definite opinion regarding the application of this law and its interpretation with respect to the duties devolving upon you thereunder in the light of the facts arising, but two of my assistants have taken contrary views and reached opposite opinions with respect to the law in question and its application and interpretation, and both of these views are sufficiently well grounded, I think, to find adherents in and from competent legal thinkers and exponents,—hence I am advising you to submit the matter to the court.

For your better information in support of the opinion that I am rendering you, I enclose herewith copy of the memorandums prepared for me by these two assistant attorneys general in which each has briefed his research and conclusion so referred to.

August 28, 1946.—046-361.

COUNTY FUNDS—FEDERAL REIMBURSEMENT

QUESTION: There has been transmitted to the chairman of the State Road Department by the chief accountant, Public Roads Administration, government check payable to the state treasurer of Florida in the amount of \$19,983.97, such sum being due Dade county for reimbursement to such county for repairs made by it to certain of its roads and streets damaged by the army or navy, or both, all as contemplated by Section 10 of the Defense Highway Act of 1941, as amended by Section 6 of Public Law 146, approved July 13, 1943. Under said act, such claim for reimbursement of Dade county was initiated by the State Road Department, and check therefor was made payable to the state. The chairman of the State Road Department has delivered said check to the state treasurer for payment to said county. Can this amount lawfully be paid to Dade county on a comptroller's warrant under authority of Section 9 of Chapter 22827, Laws of Florida, Acts of 1945, if it is deposited in one of the required five funds in the state treasury?

To Honorable J. Edwin Larson, State Treasurer:

The pertinent features of the Defense Highway Act are found in Section 110, Title 23, U. S. C. A. Reimbursement by the government for the necessary rehabilitation or repair of "roads and highways of states or their subdivisions," as provided in said law, is consequent upon claim therefor "submitted by the highway department of any state," in accordance with regulations as therein prescribed. Thus, whether the claim involves damage to a state highway or a county highway, the claim is submitted by the state and check for reimbursement is made payable to the state.

Section 9 of Chapter 22827, Laws of Florida, Acts of 1945 (General Appropriation Act), provides, in effect, that federal money appropriated by the Congress of the United States "to be used for state purposes," is re-appropriated as far as may be necessary to the purpose for which same was available and in so far as the same is permitted by the federal statutes.

This check payable to the state treasurer is in settlement of the aforesaid claim initiated and submitted by the state for the benefit of Dade county. Ordinary business methods would condemn the casual handling of this check by the state treasurer merely endorsing and delivering it to Dade county. The state treasurer must account for this check as representing money payable to the state under federal appropriation for a purpose prescribed by the federal law and shown by government records to have been so paid to the state; and this requires that the amount represented by the check be placed in one of the prescribed state funds and that it be properly disbursed by the state to meet the purpose of its payment. It would seem to be the correct construction and in accord with legislative intent that the wording in Section 9 of said Chapter 22827, "Federal money appropriated by the Congress of the United States to be used for state purposes," contemplates any federal money payable to the state for the use of the state or any political subdivision thereof. The purpose of Section 9 of said Chapter 22827 was to remove any impediment to issuance of state warrants for federal funds appropriated by Congress for the use of the state or any political subdivision thereof; and this check and the amount here involved would seem to represent federal funds appropriated for a state purpose within the purview of Section 9 of said Chapter 22827.

In view of the foregoing, in my opinion the funds represented by the aforesaid check of \$19,983.97 transmitted by the chief accountant, Public Roads Administration, and payable to the state treasurer of Florida, and due Dade county, constitutes federal money appropriated by the Congress of the United States to be used for state purposes within the meaning and intent of Section 9 of said Chapter 22827. Hence, it would seem proper that comptroller's warrant payable to Dade county for the amount of said check may be issued under the authority of Section 9 of said Chapter 22827 upon deposit by the state treasurer of said check in one of the five funds in the state treasury.

October 4, 1945.—045-309.

REVOLVING FUNDS ESTABLISHED WITHOUT STATUTORY AUTHORITY

QUESTION: What is the effect, if any, of Section 13, Chapter 22827, Acts of 1945 (the 1945 Appropriation Act) upon revolving funds, established by some of the departments of state government, without statutory authority for the establishment of such revolving funds?

To Honorable J. M. Lee, State Comptroller:

In your request for an opinion you expressly mention revolving funds established and maintained by the State Road Department and the Department of Agriculture, and make general reference to other departments.

We shall first consider the application of Section 13, Chapter 22827, Laws of Florida, Acts of 1945, to the funds of the above departments and other departments.

The expression "revolving fund" is of recent coinage and usually refers to a fund from which minor necessary and regular items of expense are paid, which fund is replenished by new funds usually equal in amount to the items of expense paid out. In many ways it is similar to a

"petty cash fund" which is a fund usually kept on hand for the payment of minor items. Statutory revolving funds have been approved and held legal in this state over constitutional objections. *State v. Croom*, 48 Fla. 176, 37 So. 303; *McSween v. State Livestock Sanitary Board*, 97 Fla. 749, 122 So. 239. In the light of these cases it would seem that there are no constitutional objections to such funds.

It is common knowledge that many of the offices, departments and agencies of the state government from time to time require items of equipment or supply of small value and where the expense of payment by state warrant would exceed the value of the item purchased. It is general knowledge that the only convenient method of handling the payment of items of this nature would be from revolving or petty cash funds. The usual method of payment from revolving funds is to advance or pay the amount of the bill or claim to the creditor, from the revolving fund, taking his receipt or voucher therefor. When a sufficient number of such receipts or vouchers are accumulated they are presented to the state comptroller for audit and approval, and when audited and approved a warrant in the total amount of such receipts or vouchers is drawn on the state treasury to the revolving fund as beneficiary, the fund having become the creditor in lieu of the original creditor by reason of its payment as aforesaid. In making this audit the same rules should be applied when auditing for payment to the revolving fund as would be applied in auditing for payment to the original creditor. I am of the opinion that revolving funds may be established without statutory authority when the necessity therefor is great and where the use of state warrants would be too expensive or inconvenient, and where the item paid out of same is a necessary and regular expense, not otherwise embraced in a department's legal set up and of a character not likely to have been contemplated by the legislature in budgeting the department's or agency's expenses. Attorneys' fees are not proper revolving fund items. No salaries, except emergency requirements, should be included in revolving fund payments, and no additional payments or items contemplated in the budget could be properly regarded as revolving fund expenses. In your auditing of revolving fund accounts, it is my opinion that you should bear in mind these provisions of the law, to wit:

1. "Any sum paid out under **this or any other account** from the moneys appropriated herein shall be by state warrant . . . payable to the ultimate beneficiary." Section 13, General Appropriations Bill, Chapter 22827, Acts of 1945. (Emphasis supplied).

2. "No . . . agency of state government shall contract to spend or enter into any agreement to spend any moneys in excess of the amount appropriated herein, and any contract or agreement in violation of this provision shall be null and void." Section 8, Chapter 22827, Acts of 1945.

3. "Immediately before the beginning of each fiscal year, the budget commission . . . shall require the head of each **spending agency** to submit on forms prescribed by the budget commission a working program for the budget year, which program shall include all appropriations for operation and all anticipated revenue and receipts and maintenance expenditures and state acquisition of property, etc." Section 11, Chapter 22827, Acts of 1945. (Emphasis supplied).

It would seem to me that in the light of this last quoted provision of law, it would be proper to require each agency or department needing a revolving fund to set up and show in a working program submitted to the budget commission the approximate amount for such revolving fund and the expenditures that it would take care of.

The rules and regulations to be followed by the comptroller in making reimbursements to revolving funds as set out in my opinion of September 11, 1945, should be followed as to revolving funds hereunder.

April 29, 1946.—046-177.

VETERANS—FREE TEXT BOOKS

QUESTION: May money be expended under Item 13b of the General Appropriation Act of 1945 for anything other than free text books for veterans?

To Honorable J. M. Lee, State Comptroller:

By an examination of the said act, it will be seen that Item 13 has reference to free text books. Paragraph b. thereof reads as follows:

"b. For the Biennium.....\$150,000.00
As a contingent fund to be used only upon authorization of the State Board of Education to take care of emergencies for educational needs occasioned by returning service men and war workers."

It is my opinion that the said \$150,000.00 refers to free text books for veterans and that only, and it cannot be used for anything other than such free text books for veterans.

May 23, 1946.—046-233.

TICK ERADICATION FUNDS

QUESTION: May the monies now on hand in the tick eradication fund be used by the State Live Stock Sanitary Board for tick eradication?

To Dr. J. V. Knapp, Secretary, State Live Stock Sanitary Board:

Section 15, Chapter 9201, Laws of Florida, 1923, as amended by Section 1, Chapter 16287, Laws of Florida, 1933, provides:

"For the purpose of carrying out the provisions and intentions of this law and for the purpose of paying all of the expenses of the State Live Stock Sanitary Board, including the compensation and expenses of all employees of said board, together with the cost of tick eradication, a special levy of one-half ($\frac{1}{2}$) mill on each dollar of the assessed valuation of all taxable property within the State of Florida is hereby levied for the years 1933, and **annually thereafter**, said levy to be levied and collected as all other taxes are levied and collected and to be remitted to the state treasurer. The funds derived from said tax levy shall be and the same are hereby **appropriated** and made available for the uses of the State Live Stock Sanitary Board for carrying out the provisions of this law, and all of the expenses of said State Live Stock Sanitary Board, **including the cost of tick eradication** and the compensation and necessary expenses of all employees of said board shall be paid exclusively from the funds collected by and under such tax levy, or as the same may be augmented by federal appropriation, or from other sources other than the State of Florida." (Emphasis supplied).

It seems clear that the legislature "appropriated" the monies to be derived from this $\frac{1}{2}$ mill special millage and further that it is a continuing appropriation. The court in construing Chapter 8410, Laws of Florida, 1921, said "The word appropriation is not used in connection with the setting aside of a portion of the money to pay for number plates, postage and clerical work, but it is as much an appropriation as if that word

were used. It is a setting apart of money formally or officially for a special use or purpose (see Funk and Wagnall Standard Dictionary) and, where that is done by the legislature in clear and unequivocal terms, it is an appropriation. Statutes setting apart or designating public monies for special governmental purposes have been held to be appropriations notwithstanding the word appropriation is not used," (*State v. Allen*, 91 So. 104; *Amos v. Mosely*, 77 So. 619) and that the legislature could make a continuing appropriation is not doubted for "The provision of the constitution which requires, 'the legislature shall provide for raising revenues sufficient to defray the expenses of the state for each fiscal year,' is not an inhibition on the power of the legislature to make continuing appropriations." (*Amos v. Mosely*, supra; *Carlton v. Mathews*, 137 So. 814, 837).

As to whether or not the appropriation provided in Chapter 22827, Laws of Florida, 1945, was intended to embrace the monies received from the special millage presents a difficult question. Although the language of Chapter 16287, supra, and the decisions construing such statutes clearly "appropriates," it appears that the legislature regarded the monies in this fund as being "earmarked" but not "appropriated." This is borne out by examining the several appropriation acts of the past years. Prior to the amendment to Section 2, Article IX, Florida Constitution, which abolished all ad valorem for state purposes, Chapter 15858, the general appropriation act for 1933, appropriated a specific sum of money for the State Live Stock Sanitary Board, making no mention of the special millage, however, in the 1935 appropriation act, Chapter 16772, the appropriation is from the funds derived from special millage. In the 1937 appropriation act, Chapter 17707, there is appropriated a definite sum with proviso that it is to come exclusively from the proceeds of the $\frac{1}{2}$ mill special millage. In the 1939 appropriation act, Chapter 19280, it provided "there is hereby appropriated out of general revenue an amount which, when added to the proceeds from special millage will make up a total of \$200,000.00." The appropriation acts for the years 1941, 1943 and 1945, make no reference to any monies that may be derived from this $\frac{1}{2}$ mill levy and it appears that the appropriations were from general revenue. Conceding that the legislature has never treated or regarded Chapter 16287, supra, as an appropriation act and being mindful of the great weight and persuasive force the courts will attach to long standing administrative or legislative interpretation of statutes, nevertheless where the legislative intent is clearly manifested by the language of the act considered in its ordinary and grammatical sense, rules of construction are unnecessary and inapplicable. (*State v. Beardsley*, 84 Fla. 109, 94 So. 660; *State v. Burr*, 79 Fla. 290, 84 So. 61; *Doggett v. Railroad Co.*, 99 U. S. 72, 25 L. ed 301; *Douglas v. McRainey*, 137 So. 157; *State v. Amos*, 79 So. 433). It is a well established rule of statutory construction that the language of a statute may be so plain as to fix the legislative intent and leave no room for interpretation and construction. (*Osborne v. Simpson*, 94 Fla. 793, 114 So. 543). In my mind the language used in Chapter 16287 is so clear and unambiguous that there can be no question but what the legislature "appropriated" the monies derived from this special millage for the purposes stated in said act. This being so, the legislative interpretation of the said act "earmarking these funds," if the legislature did so interpret, is of no weight nor force. It is well to also bear in mind that "when funds are raised by taxation for one purpose they cannot be diverted to some other purpose without legislative authority." *Oven v. Ausley*, 143 So. 589; 16 C. J. 584; *Harrell v. Woodberry*, 56 So. 297; *Northup v. Hoyt*, 45 Pac. 754, and "when an enforced contribution is exacted from the people by the power of taxation, it is for a specific public purpose, and the fund so raised is a trust fund in the hands of the legal custodian of it. There may exist circumstances in which the fund may be diverted to some other lawful purpose than that for which it was raised. Appropriation of public monies for certain

public purposes involves the power of taxation, and when the money is taken from a fund created by the levy of a tax and applied to some other purpose it is equivalent to the levy of a tax for such purpose." (Emphasis supplied) *Oven v. Ausley*, supra.

I, therefore, conclude that the monies now on hand in this fund may be used by the State Live Stock Sanitary Board for tick eradication purposes and that the sum of money appropriated by the 1945 legislature out of the general revenue was in addition to such monies.

PUBLIC PRINTING

January 7, 1946.—046-6.

OUT-OF-STATE EXHIBITS—NONRESIDENT PRINTERS

QUESTIONS: 1. Is the Florida State Advertising Commission authorized under the statute creating the commission and defining its powers, to expend funds for the purpose of furnishing exhibits outside of the State of Florida?

2. May the Florida State Advertising Commission, under the provisions of the statute creating the commission and defining its powers, be authorized to enter into contracts for the furnishing of printed advertising matter with nonresident printing concerns or establishments?

To Mr. Roy C. Beckman, State Director of Advertising:

The first question is answered in the negative. It is assumed that the word, "exhibits," employed in this question is intended to refer to products of agriculture or manufacture, produced in the State of Florida and exhibited at fairs or expositions conducted outside the state—Chapter 22558, Acts of 1945, creating the Florida State Advertising Commission and defining its powers, by the provisions of Section 11 expressly limits the media which the commissioner is authorized to employ in the dissemination of advertising material by definite recital of specified methods. The exhibits referred to in this question could not reasonably be included in any of the means or methods of advertising specified by the act.

The second question is answered in the negative. Section 283.03, Florida Statutes, 1941, provides that all of the public printing of the state shall be done within the state. The character of the printed matter contemplated by question number 2 is such as is comprehended within the terms of the public printing statute. It is the intention of the statute that all contracts for public printing pursuant to competitive bids shall be let to bidders who operate their plants and will contract to execute the work within the state.

STATE FIRE INSURANCE FUND

March 2, 1945.—045-62.

PROPERTY HELD IN TRUST BY THE STATE

QUESTION: Is a business building, rented to commercial concerns, which property heretofore was transferred to the state in trust for specified educational purposes, property of the state which should be insured in the state fire insurance fund, as contemplated by Chapter 284, Florida Statutes, 1941?

To Honorable J. Edwin Larson, State Fire Marshal:

The property in question is that known as the Westcott property located at the northwest corner of the intersection of College avenue and Monroe street in the City of Tallahassee, Florida. It is held by the state in

trust for the educational purposes particularly set forth by the donor in the instrument transferring the property to the state. The Board of Control is the trustee designated by the court with respect to such trust. The property in question is now occupied by mercantile establishments under lease or rental agreements. At first glance, it would appear that according to the express statutory language of Sections 284.01 and 284.04 this property is property of the State insurable in the state fire insurance fund. However, a reading of said Chapter 284 is necessary in order to ascertain whether or not this chapter dealing with the state fire insurance fund contemplates that property of this type is insurable in the fund.

Section 284.05 provides that the state treasurer, in person or by his representative, is required to inspect all property of the state insured in the state fire insurance fund, and is vested with power to require that any conditions found to exist with respect to any property insured in said fund which, in the opinion of the state treasurer, or his representative are hazardous from the standpoint of destruction by fire, be immediately remedied or repaired. Attention is further directed to the fact that Chapter 284 has no provisions for cancellation of insurance of any property insured in the state fire insurance fund. It is apparent that while the Westcott property is state property, yet its occupancy by commercial concerns places it on a different status from that of property owned, occupied and used strictly for state purposes.

For the reasons set forth in the preceding paragraph, and further, from a reading of entire Chapter 284, it is my conclusion that the Westcott property is not state property which is insurable in the state fire insurance fund; and it is my opinion that the above question properly is answered in the negative.

PUBLIC BUSINESS GENERALLY

December 8, 1945.—045-382.

MAINTENANCE OF OUTDOOR ADVERTISING BILLBOARDS

QUESTION: What is the statutory authority of the Florida State Advertising Commission to erect and maintain outdoor advertising billboards within the territorial limits of the State of Florida in carrying out the purposes and powers conferred upon the commission under the provisions of Chapter 22558, Laws of 1945?

To Honorable R. A. Gray, Secretary, Florida State Advertising Commission:

The cited chapter specifically defines the character of advertising material which the board is authorized to employ in carrying out the purposes of the act, and the particular designation of that character of advertising matter referred to in your letter is confined to "outdoor advertising outside of the State of Florida." A consideration of the specific powers granted to the commission indicates a clear legislative intent that all means of advertising authorized by the statute shall be such as is disseminated beyond the territorial boundaries of the state.

Inasmuch as the statute, by its provisions, limits the character and the medium of advertising matter, in my opinion the commission is not authorized to contract for the erection nor the maintenance of billboards exhibiting outdoor advertising matter within the territorial boundaries of the state.

Inasmuch as the pertinent statute prescribes a limit upon the authority of the commission in its dissemination of information pertaining to the state, the statute is subject to strict construction and any deviation from the authorized methods or means of advertising would constitute an exercise of authority beyond the limitations prescribed by the statute.

August 21, 1945.—045-246.

STATE ADVERTISING COMMISSION—EXPENSES

QUESTION: Should the amount to be allowed the members of the Florida State Advertising Commission for traveling and other expenses, be determined by Section 5 of Chapter 22558, Acts of 1945, by Chapter 22830, Acts of 1945, or by both of said acts?

To Honorable J. M. Lee, State Comptroller:

Said Section 5 of Chapter 22558 provides that such members "serve without compensation" other than their "actual expenses, including travel expense," while said Chapter 22830 provides that "state employees . . . shall be allowed for subsistence \$7.50 per diem and mileage." The members of the Florida State Advertising Commission are state officials within the purview of Chapter 22830. The provision in said Section 5 of Chapter 22558, is similar to provisions in other statutes providing in substance for the payment of "actual and necessary traveling and other expenses" of boards, commissions, agencies, etc. (See Sections 249.03, 391.03, 440.44, 463.18, 464.04, 467.04, 470.06, 471.09, 473.21, 474.06, 475.08, 517.04 and 589.03, Florida Statutes, 1941).

Chapter 22558 became a law and took effect on May 4, 1945, and Chapter 22830 on June 11, 1945. Chapter 22830 contained general repealer clause of "all laws and parts of laws in conflict" therewith.

The question here presented is substantially the same as that presented and passed upon by an opinion to the State Board of Optometry, under date of December 19, 1944, (1943-44 Reports, page 404) where it was held that a similar provision in Section 463.18, Florida Statutes, 1941, relating to expenses of the State Board of Optometry, was repealed by Chapter 21913, Acts of 1943, which was substantially the same in legal effect as Chapter 22830, Acts of 1945. The title to Chapter 22830 is "an act fixing the per diem and traveling expenses of state officers and employees when traveling on state business," which seems to be all-inclusive. There are no exceptions recognized in said Chapter 22830. It seems to be a general revision on the subject and therefore in conflict with Section 5 of Chapter 22558 in so far as it relates to expenses of state officers and employees. Chapter 22830 will, by its term, expire June 30, 1947.

You are, therefore, advised that Chapter 22830 suspends Section 5 of Chapter 22558 in so far as it relates to traveling expenses, until June 30, 1947, and that traveling expenses of the member of the Florida State Advertising Commission should be paid pursuant to Chapter 22830 until June 30, 1947, instead of Section 5 of Chapter 22558.

STATE BUILDING FUND

September 21, 1945.—045-296.

USE IN CONSTRUCTION OF STATE BUILDINGS

QUESTION: May moneys in the state building fund (provided by Chapter 22820, Laws of Florida, 1945) be used in the construction of state buildings which are not specifically listed in the act?

To Honorable C. H. Overman, Director, Florida State Improvement Commission:

The act says in Section 1:

" . . . there is hereby appropriated out of the general fund the sum of three million dollars (\$3,000,000.00) to be available to the Board of Commissioners of State Institutions for the purpose of providing in a manner deemed expedient such buildings

and other facilities as the said board may determine. . . . Among buildings and other facilities to be provided shall be those hereinafter listed, or so many of them as the Board of Commissioners of State Institutions may deem feasible." (Emphasis supplied).

It is my opinion that your question should be answered in the affirmative.

Of course, such buildings and facilities which the board might determine are expedient are those of which the state is in urgent need for the use of its departments, boards and institutions.

CHAPTER XVI

PENSIONS AND WAR VETERANS

CONFEDERATE PENSIONS

September 15, 1945.—045-299.

PAYMENTS—RENEWAL AFTER ABSENCE FROM STATE

QUESTIONS: 1. Is a recipient of a Confederate pension, who has been absent from the state for a period of longer duration than twelve months, entitled to receive monthly payments of the pension beyond the twelve months' period in a case where such absence has been necessitated by illness?

2. In what form should application for renewal of pension payments be made in a case where the pensioner returns to the state after a period of absence of longer duration than twelve months?

To Miss Roumelle Bowen, Secretary, State Board of Pensions:

1. Under the provisions of Section 291.10, Florida Statutes, 1941, a pensioner who has been absent from the State of Florida for a period of longer duration than twelve consecutive months is not entitled, under any circumstances, to receive pension payments during the period of such absence after the expiration of twelve months. Upon the return of such pensioner to the state, pension payments may be renewed upon the application of the pensioner, accompanied by satisfactory proof that the absence from the state was not permanent. Payments may not be continued under such circumstances until proper application has been made with the satisfactory proof indicated. Section 291.11, Florida Statutes, 1941, provides for the restoration of a pensioner to the pension roll where absent from the state has continued for a period of longer duration than twelve months and which absence has been made necessary by reason of physical infirmity only in cases where the pensioner has reached the age of 83 years or more. The particular case, as indicated by your letter, does not fall within the terms of this section.

2. There is no particular form prescribed by the statute to be employed in applications for renewal of pension payments upon the return of a pensioner to the state after absence for a period in excess of twelve months. The form of application is a matter which may be determined by the pension board. Inasmuch, however, as the statute requires proof that the absence beyond the statutory period was not permanent, it is suggested that a recital of the facts and circumstances under which the absence continued should be set forth by the applicant in a form of affidavit.

July 11, 1945.—045-181.

WIDOW OF VETERAN—MARRIAGE AFTER JUNE 1, 1917

QUESTION: Is Chapter 23031, Acts of 1945, which chapter specifically directs the State Board of Pensions to pay a Confederate pension to a deceased Confederate soldier's widow, whose marriage (as related in the preamble of said chapter) was solemnized after June 1, 1917, a valid provision of law, when, at the time of the enactment thereof, there existed a prior general law (Section 291.04, Florida Statutes, 1941) requiring, among other things, that in order to be entitled to receive a Confederate pension, the widow of a deceased Confederate soldier must have been married on or prior to June 1, 1917?

To Miss Roumelle Bowen, Secretary, State Board of Pensions:

It is settled that one legislature cannot abridge the power of a succeeding legislature, unless the act of the first is of such character as to call into operation constitutional limitations upon the power of the second, such as the prohibition against the extinguishment of vested rights which have been acquired under the former law, or the impairment of the obligations of a contract, or the denial of due process of law. *Trustees Internal Improvement Fund vs. St. Johns Railway Company*, 16 Fla. 531, 552, 553; 50 Am. Jur. 62, 63, "Statutes," Section 45. Section 291.04, as applied to Chapter 23031, raises no such constitutional inhibition. Chapter 23031 operates therefore to engraft an exception upon Section 291.04, to the extent that said chapter conflicts with said section. 50 Am. Jur. 564, "Statutes," Section 563.

For the above reasons, it is my opinion that your question as stated above should be answered in the affirmative.

February 28, 1945.—045-53.

WIDOW OF DECEASED VETERAN

QUESTION: Is the widow of a deceased Confederate soldier required to submit to the State Board of Pensions proof of sufficient military service of said soldier, in order to be entitled to receive a Confederate widow's pension specifically directed to be paid her by act of legislature, when said soldier was receiving a Confederate pension from the State of Florida at the time of his death, but the Confederate army company, designated in said soldier's application for pension as the company in which he enlisted and served, differs from the company so designated in the preamble of said act of legislature?

To Miss Roumelle Bowen, Secretary, State Board of Pensions:

It appears from your letter that the widow whose pension application is here under consideration claims to be entitled to same under and by virtue of Chapter 14806, Vol. 1, Laws of Florida, Acts of 1931. In substance said act provided that the State Board of Pensions was directed to place the name of said widow upon the pension roll of the State of Florida and to pay to her a pension; provided, however, that nothing in the act shall be construed to prohibit the right of said board to remove the name of the pensioner from the pension roll if, after investigation, said board shall find that the alleged soldier upon whose service said pension is based did not render service during The War Between the States such as would entitle him to receive a pension or that he deserted from the service.

A clear legislative intent appears, therefore, that the payment of said pension is mandatory unless the board itself investigates and finds the military service of the pensioner's deceased husband to have been insufficient. No duty upon the pensioner to furnish evidence or prove same can be implied from the terms of the statute.

It is further to be noted that the preamble of a statute is "not part of the act" and can neither extend nor restrain the meaning of an unambiguous statute; nor can it be used to create doubt or uncertainty which does not otherwise exist. *Sutherland on Statutory Construction*, 3rd Edition by Horack, Sections 4894, 4807; 50 American Jurisprudence 297, Title "Statutes."

For the foregoing reasons it is my opinion that your question should be answered in the negative.

SERVICE OFFICERS

August 8, 1946.—046-341.

VETERANS COMMISSION—LEASE FOR OFFICES

QUESTIONS: 1. May the State Veterans' Commission lawfully execute a lease contract for office space for one of its assistant state service officers, the lease to cover more than one year or to encumber the following year's budget with the amount of the rental agreed to be paid?

2. Should such a lease contract be executed in the name of the State of Florida?

To Mr. David L. Wiley, State Service Officer, St. Petersburg, Florida:

Section 292.05 (2) authorizes the State Veterans' Commission to incur such expenses as it may deem necessary to carry out the object and purposes of the commission as set out in the statutes. This is sufficient authority for the rental of office space if the commission finds such space necessary in the performance of its duties. Such a lease contract may lawfully extend over the entire legislative biennium, but it should not extend beyond the present biennium which ends June 30, 1947. If it is deemed advisable, option to renew at the end of the biennium can probably be arranged in the contract.

Such a lease contract should be executed in the name of the State Veterans' Commission pursuant to an appropriate resolution by the commission authorizing the execution of the lease in the name of the commission by its chairman.

August 8, 1945.—045-219.

STATE VETERANS' COMMISSION—SALARIES

QUESTION: Should the requisition for payment of salaries filed by the state service officer, assistant state service officer and field secretaries holding office under Section 292.02, Florida Statutes, 1941, for the month of July, 1945, be honored?

To Honorable J. M. Lee, State Comptroller:

Sections 292.02 and 292.03, Florida Statutes, 1941, were expressly repealed by Chapter 22695, Acts of 1945, creating a Veterans' Service Commission. The act of 1945 became effective May 24, 1945. The state service officer, assistant service officer and field secretaries appointed under the provisions of Section 292.02 were acting by virtue of their appointment during the month of July, 1945. Chapter 22695, Acts of 1945, substantially reenacted the provisions of Sections 292.02 and 292.03, Florida Statutes, 1941.

It is a well settled rule that when a repealing act reenacts substantially the provisions of the act repealed, the latter is construed not to be thereby destroyed or interrupted in its operation. The repealing act under such circumstances will be held to be an amendment of the former act rather than a repeal thereof. (9 So. Rep. p. 446). The question is answered in the affirmative.

August 11, 1945.—045-234.

EMPLOYMENT BY COUNTY COMMISSIONERS

QUESTIONS: 1. Under Section 5 of Chapter 22695, Laws of Florida, 1945, can a single service officer be appointed by, say, the board of county commissioners in any county, and assistant service officers be appointed by the municipalities in the same county?

2. Can more than one service officer be appointed by one board of county commissioners?

3. Can any county and the various municipalities therein place their moneys in one fund to be disbursed therefrom by the board of county commissioners?

To Messrs. Hudson and Cason, County Attorneys, Dade County, Miami, Florida:

1. I do not think the law contemplates the appointment of assistant service officers. All service officers must be of the same grade.

2. I see nothing in the law forbidding this. No doubt the legislature thought that the board of county commissioners would have the welfare of the county so at heart that it would not appoint more service officers than were necessary.

3. I know of no reason why this cannot be done.

June 3, 1946.—046-240.

VETERANS COMMISSION—NOTARY PUBLIC—EXPENSE

QUESTION: Is the State Veterans Commission authorized to bear the expenses incident to the commissioning as notaries public of the six assistant state service officers and one employee in the office of the state service officer?

To Honorable David L. Wiley, State Service Officer, St. Petersburg, Florida:

It is true that the commissions as notaries public would be issued to the employees in question in their personal capacities, not as employees of the commission, and by virtue of such commissions they would be empowered to perform many functions in no way related to their sphere of employment.

Nevertheless, the purpose of the State Veterans Commission Act (Chapter 22695, Laws of 1945) is to provide assistance to all former, present and future members of the armed forces of the United States and their dependents in preparing claims for and securing such benefits or privileges to which they may be entitled; and the act provides that the commission may "incur such expenses as it may deem necessary to carry out the objects and purposes of this law."

It is well known that numerous claims and applications in the preparation of which the act contemplates that the commission and its employees shall assist require the certificate of a notary public or some other officer authorized to administer oaths. That the services of notaries public be made available in this connection seems consistent with the purpose of the act.

Therefore, provided the commission deems it necessary in carrying out the objects and purposes of the law that the designated employees be commissioned as notaries public, it is my opinion that the question should be answered in the affirmative.

July 1, 1946.—046-269.

VETERANS COMMISSION—UNEXPENDED FUNDS

QUESTIONS: 1. May the State Veterans' Commission carry forward any unexpended balance from this years appropriation of \$150,000, and use such balance during the next fiscal year for the payment of salaries and expenses?

2. May the State Veterans' Commission pay for equipment contracted for during this fiscal year but not received until after June 30 out of unexpended balance of the appropriation for this fiscal year?

To Honorable Terry C. Lee, Budget Director:

There are no Florida decisions answering your first question, and a very thorough search for decisions by the courts of other states discloses surprisingly little aid on the question. Such authorities as I have found support the view that unexpended balances of such continuing appropriations do not revert at the end of the first fiscal year. I am persuaded to the same view by consideration of the over-all legislative intent in regard to appropriations for the operation of state agencies as disclosed by the General Appropriation Acts in recent years. Since 1933 every General Appropriation Act has contained a provision under which unexpended balances at the end of the first fiscal year of the biennium carry over into the second year. There appears to be no sufficient reason to attribute a different legislative intent in regard to continuing appropriations, and I think this fixed policy of the legislature so clearly set out in every General Appropriation Act should be applied to continuing appropriations in the absence of a contrary intention clearly expressed in the statute.

My answer to your first question is that unexpended balances of the commission do not revert at the end of the fiscal year, 1945-1946. The answer to the first question makes it unnecessary to consider the second question.

UNIFORM VETERANS' GUARDIANSHIP LAW

August 27, 1946.—046-360.

COPY OF DISCHARGE—FEE OF CLERK

QUESTION: Under the new so-called "Veterans Enlisted Men's Terminal Pay Act" it is necessary that a veteran applying for such terminal leave pay furnish a copy of his discharge from the United States to the Bureau of Naval Personnel or to the Bureau of Army Personnel. You desire to know (1) if the clerks of the courts are required to furnish to the veterans applying for such terminal leave pay, or to the Army or Navy personnel, certified copies of such discharges without cost? (2) if the said clerks are not required to furnish said certified copies of discharges free, are the clerks allowed to arbitrarily reduce their fee of \$1.20 for the furnishing of such copies to the actual cost of making same?

To Honorable Bryan Willis, State Auditor:

In answer to your first question, I rendered an opinion on April 15, 1946, in which I said that under Section 293.15, Florida Statutes, 1941, such certified copies should be made without cost to the Veterans Bureau to determine the eligibility of any person to participate in benefits made available by such bureau.

Inasmuch as this terminal leave pay is not for any benefits made available by the Veterans Bureau, I do not think that Section 293.15 will apply and the clerks should charge for certified copies of discharges to be used by the veterans or the said Naval or Army personnel for use in obtaining or attempting to obtain such terminal leave benefits.

I do not think the legislature intended that every time Congress passed a law for the benefit of veterans, however meritorious such a law might be, that the clerks of the courts of this state would be required to furnish certified copies free of charge to obtain such benefits.

I still adhere to my opinion of April 15, 1946, however, that it is the duty of the clerks of the courts to provide the Veterans Bureau with such free copies as set forth in that opinion.

Answering your second question, I do not think that any clerk should arbitrarily reduce the fee for furnishing such copies of said discharges

for terminal leave pay. This would entail the utmost confusion in the state for one clerk might be able to make the copies cheaper than another, and this would destroy all uniformity.

VETERANS, GENERALLY

September 5, 1945.—045-280.

VETERANS AND THEIR WIDOWS—PREFERMENT IN CIVIL SERVICE AND MERIT SYSTEMS

QUESTION: Does Chapter 23015, Laws of Florida, Acts of 1945, grant preference to persons possessing honorable discharges from the military forces of the United States, and the widows of such persons, in taking civil service or merit system examinations for promotion in state, county or municipal public employment?

To Honorable William M. Madison, Attorney for the City of Jacksonville, Jacksonville, Florida:

The pertinent portion of Chapter 23015 reads as follows:

"In grading the papers of, or otherwise determining the standing, status or rating of persons taking civil service, merit system, and other competitive examinations for public employment, whether under the civil service laws or merit system of this State or any municipality or county in this state, preference shall be given to all persons possessing honorable discharges from the military forces of the United States of America, and the widows of such persons, by awarding unto them ten points in addition to the rating earned by them, and by placing each person entitled to the benefits of this act at the top of or in the prior or preferential position on the list of eligibles having the same rating."

Civil service and merit system laws are designed to make fitness and efficiency the basis of public employment. Therefore, legislation which grants preference to a particular class of persons constitutes a departure from that basis and should be strictly construed. *Phillips v. De Las Casas et al*, 102 N. E. (Mass.) 717.

Whether Chapter 23015 is applicable only to those of the preferred class taking examinations for the purpose of entering public employment or is also applicable to persons of that class taking examinations for the purpose of obtaining promotion in such employment must be determined by interpretation of the phrase: "for public employment."

Strict construction of the quoted phrase requires that it be given its ordinary meaning, which is: "**for the purpose of entering, or obtaining, public employment.**" Public employment, not promotion in such employment, is the end to which the examination and preferment are the means.

It must be assumed that if the legislature had intended the act to have a greater scope, that intention would have been expressed in unequivocal language.

Therefore, your question is answered in the negative.

CHAPTER XVII

PORTS AND HARBORS

HARBOR MASTER

January 15, 1946.—046-16.

FEES FROM TRANSIENT YACHTS

QUESTION: Is the harbor master of the port of Miami authorized by law to collect fees from the masters, owners or consignees of private or pleasure yachts entering that port when no direct service by him or his deputies is rendered to such yachts?

To Honorable Millard F. Caldwell, Governor:

Section 314.08, Florida Statutes, 1941, provides that:

"Such harbor master shall receive from the master, owner or consignee of vessels coming into the port for which he is appointed under this chapter, for the services rendered by himself or deputy, under the provisions of this chapter, not exceeding the sum of twenty dollars, according to the amount and value of the services rendered."

A "vessel" is defined as any structure, especially a hollow one, made to float upon the water for purposes of navigation; a craft for navigation of the water, often specifically one larger than a common rowboat. *City of Tampa v. Tampa Shipbuilding & Engineering Co.*, 186 So. (Fla.) 411. Within this definition a private or pleasure yacht is a "vessel". *Barker v. Inhabitants of Town of Fairhaven*, 163 N. E. (Mass.) 901.

Even though no direct services to a vessel are required of or performed by the harbor master or his deputies, many indirect services are rendered, such as proper policing of the port and so stationing other vessels as to prevent collision and confusion; and for these indirect services Section 314.08 contemplates that a reasonable charge may be made "not exceeding the sum of twenty dollars, according to the amount and value of the services rendered." *Vincent v. Foss & Crabtree*, 160 So. (Fla.) 49; *Clark v. Kreidt*, 199 So. (Fla.) 333.

Therefore, it is my opinion that your question should be answered in the affirmative, provided the fee does not exceed the sum of twenty dollars and is reasonable with relation to the amount and value of the indirect services rendered.

CHAPTER XVIII

MOTOR VEHICLES

TRAFFIC ON HIGHWAYS

March 1, 1946.—046-86.

MOTOR VEHICLES—DRUNK DRIVING

QUESTION: Should a prosecution against a person for driving a motor vehicle on a public highway or street while under the influence of intoxicating liquor be framed under Section 317.20, Florida Statutes, 1941, or under Section 860.01, Florida Statutes, 1941, as amended by Chapter 22000, Acts of 1943?

To Honorable Forsyth Caro, County Solicitor, Pensacola, Florida:

Section 317.20, Florida Statutes 1941, requires that the driver be under the influence of intoxicating liquor, and that he or she be "affected to the extent that his or her normal faculties are impaired."

Section 860.01, Florida Statutes 1941, as amended by Chapter 22000, Acts of 1943, requires that the driver be under the influence of intoxicating liquor "to such extent as to deprive him of full possession of his normal faculties."

My opinion is that if a person is "affected to the extent that his or her normal faculties are impaired," he or she is also affected "to such extent as to deprive him (or her) of full possession of his (or her) normal faculties," and vice versa. The same proof would suffice under either allegation, even though the phraseology is different.

However, since Section 860.01, as amended in 1943, is the latest expression of the legislative will, I think that informations against drunk drivers of motor vehicles on public highways and streets should be framed thereunder.

February 15, 1946.—046-63.

TRUCKS—APPLIANCES—PINE STUMPS

QUESTION: Does Section 317.60 prescribing safety appliances upon trucks or wagons hauling logs or pulpwood apply to a truck hauling split pine stumps?

To Col. H. N. Kirkman, Director, Department of Public Safety:

Section 317.60 provides that every owner, licensee and driver of any truck or wagon carrying logs or pulpwood shall use certain appliances necessary to insure that the load may not be displaced as a result of its operation over the public highways. The statute is penal in nature and is therefore to be strictly construed. The quoted section describes the lading upon the vehicle as logs and pulpwood and under the rule of strict construction must be confined to that particular character of load. The terms "logs" and "pulpwood" are both susceptible of judicial definition, the former being judicially defined as parts or sections of the trunks or stems of trees after severance from the root or stump, and the latter being defined as such parts or sections of tree trunks as are adaptable to the manufacture of wood pulp.

A strict construction of the quoted section of the statute would not include "split pine stumps," which are not logs as judicially defined nor are they necessarily pulpwood.

Confining this opinion to a legal interpretation and construction of the language of Section 317.60, my opinion is that a person transporting split pine stumps in a motor vehicle would not be subject to the imposition of the penalty directed by Section 317.60 for failure to comply with the provisions of that section with regard to the equipment of his vehicle with the prescribed appliances required by the act. The question is accordingly answered in the negative.

September 3, 1946.—046-372.

AUXILIARY RED LIGHTS—AUTOMOBILE

QUESTION: Is there any law preventing private citizens from having red lights on their personal automobiles?

To Honorable J. L. Baggett, Sheriff, Dixie County, Cross City, Florida:

I assume that you mean auxiliary red lights and not, of course, the ordinary tail lights.

We have no statute in this state forbidding a private individual to have a red auxiliary light on his automobile; however, I would call your attention to Section 317.59, Florida Statutes, 1941, which requires all auxiliary lights to be extinguished when passing another vehicle.

MOTOR VEHICLE COMMISSIONER

June 18, 1945.—045-147.

AUTHORITY TO HAVE AND USE SEAL

QUESTION: Is the motor vehicle commissioner of the State of Florida authorized to have and use an official seal?

To Honorable George H. Asbell, Motor Vehicle Commissioner:

The only reference I have been able to find in the statutes of this state concerning a seal for the motor vehicle commissioner is in Section 319.02, Florida Statutes, 1941, whereby it is provided that in certain specified circumstances such commissioner shall issue an appropriate certificate of title "authenticated by his official seal." It is difficult to see how the commissioner could issue a certificate in compliance with the provisions of such section without having an official seal.

It is my opinion that when Section 318.03, Florida Statutes, 1941, relating to the powers and duties of the commissioner, and Section 319.02 are considered together, it seems clear that your question should be answered in the affirmative.

This opinion is limited to the law as it stood prior to the 1945 regular session of the legislature of the State of Florida, inasmuch as I do not have available for examination the laws enacted by such legislature.

TITLE CERTIFICATES

April 15, 1946.—046-154.

MINOR—POWER TO OWN AUTOMOBILE

QUESTION: Is there any statutory regulation under the law of Florida with regard to age limit of any person authorized to own a motor vehicle?

To Honorable George H. Asbell, Motor Vehicle Commissioner:

There is no statutory restriction upon the right to own a motor vehicle imposed by the statutes of the State of Florida with regard to limitation of age. The question is accordingly answered in the negative.

February 15, 1945.—045-47.

TRUCKS AND TRAILERS—REGISTRATION

QUESTIONS: 1. Does the signing of a certificate of title application for an automobile, such as the motor vehicle department uses, known as Form #F-3B-65M-(3-44), come within the provisions of Chapter 21950, Acts of 1943, which eliminates the necessity of signing under oath under certain circumstances?

2. Does an application for truck and trailer registration require the applicant to take oath in view of Chapter 21950, Acts of 1943?

To Honorable George H. Asbell, Motor Vehicle Commissioner:

Section 1, Chapter 21950, Acts of 1943 (Section 192.57, 1943 Supplement to Florida Statutes, 1941) reads as follows:

"No tax return or application for tax exemption, license, or permit of any kind or nature that may be required by law, need be made under oath."

It is my opinion that the certificate of title application on Form #F-3B-65M-(3-44), used by your office, would not come within the provisions of Chapter 21950, Acts of 1943.

It is my further opinion that Form #2-45-250M, used by the motor vehicle department, wherein the form is based on an application which requires the collection of fees in the form of a tax or license would not come within the provisions of Chapter 21950, Acts of 1943.

May 28, 1946.—046-234.

NOTICE OF LIENS—REGISTRATION

QUESTION: Is it required under existing law that title certificates issued to owners of motor vehicles shall bear a notation upon the face of the certificate with respect to the existence of liens upon the vehicle at the time of registration?

To Honorable George H. Asbell, Motor Vehicle Commissioner:

This is with reference to your request for an opinion upon the above question. Section 319.02, Florida Statutes, 1941, provides, among other things, that application for certificates of title for motor vehicles shall be upon a blank form which shall contain a full description of the motor vehicle together with a statement of the applicant's title and of any liens or encumbrances upon such motor vehicle. This section further provides that upon such application an appropriate certificate of title shall be issued authenticated by the official seal of the motor vehicle commissioner, and shall contain a notation of any liens or encumbrances which the applicant may have indicated upon his application.

Section 319.15, Florida Statutes, 1941, provides for the recording in the office of the motor vehicle commissioner of any lien which may be imposed upon a motor vehicle by written instrument in the nature of retain title contract, conditional bill of sale, chattel mortgage, or otherwise, prior to or subsequent to application for certificate of title. The latter section provides for the recordation of the notice of lien and the preservation of the record thereof by the motor vehicle commissioner.

The two sections deal with separate requirements and are not in conflict. Section 319.02 was not affected by the enactment of the statute now compiled as Section 319.15. Applicants for certificates of title are required to note upon their application the nature and amount of existing liens and the motor vehicle commissioner is required to endorse upon the face of the certificate such information. For their own pro-

tection as against the interest of purchasers, holders of liens created after certificates of title have been issued are required to give notice to the motor vehicle commissioner of such liens that the same may be recorded.

In so far as opinion rendered on July 8, 1941, may appear to be in conflict with this opinion, the former is superseded.

December 4, 1946.—046-492.

TRANSFER OF TITLE—REPOSSESSION

QUESTION: Under the law of Florida is the motor vehicle commissioner authorized to issue a certificate of title to a motor vehicle without surrender of the original certificate of title properly assigned by the owner to a person who makes application therefor, claiming ownership by reason of a repossession of the vehicle on account of default in the fulfillment of a contract of sale?

To Honorable George H. Asbell, Motor Vehicle Commissioner:

The issuance of a new certificate of title after sale or transfer of a motor vehicle is governed by Section 319.03, Florida Statutes, 1941, which sets forth the requirements to be complied with to entitle any applicant to a new certificate of title. This section requires that in order to secure a new certificate of title, the current certificate must be endorsed on the back thereof with an assignment in the form of an affidavit printed thereon and that the current certificate must be surrendered to the motor vehicle commissioner as a prerequisite to the issuance of a new certificate. Section 319.06, Florida Statutes, 1941, provides for the issuance of a duplicate certificate where proper proof is presented of the loss and destruction of the original. These are the only two sections of the statutes under which the motor vehicle commissioner is authorized to issue a new or a duplicate certificate.

The question of ownership of a motor vehicle which is claimed by a person under the right to repossess the vehicle on account of default in the performance of a contract of sale is a judicial question and ownership of a vehicle by such a claimant may not be established except by a judicial decree.

You are not authorized to issue a new or duplicate certificate of title upon any showing short of a judgment of a court of competent jurisdiction that the ownership of the vehicle is vested in the applicant. The question is, therefore, answered in the negative.

October 23, 1945.—045-331.

TRANSFER OF CERTIFICATES

QUESTION: May the assignment of a certificate of title to a motor vehicle be secured upon a separate form other than the one printed on the reverse side of the title certificate?

To Honorable George H. Asbell, Motor Vehicle Commissioner:

Your letter of October 16 is received, with the attached copy of a letter addressed to you making inquiry as to whether the assignment of a certificate of title to a motor vehicle given as collateral in a transaction involving the loan of money to the owner of the vehicle where the vehicle is pledged as security for the payment thereof may be executed upon a separate instrument in the nature of a power.

In so far as the law of Florida regulating the issuance and transfer of certificates of title for motor vehicles is concerned, it is immaterial in what place the transfer or assignment of the certificate as collateral

security for a loan is executed. The state is only concerned with the manner in which a certificate of title may be assigned or transferred in the event of a sale of the motor vehicle where delivery of the vehicle itself is effected to the purchaser. Section 319.03, Florida Statutes, 1941, requires that in the event of the sale or transfer of ownership of a motor vehicle for which a certificate of title has been issued, an assignment of the certificate of title must be executed by endorsement on the back of the same containing a warrant of the title in the form of affidavit printed thereon, and provides that the certificate must be delivered to the purchaser at the time of delivery of possession of the motor vehicle.

It is assumed from the letter which you submit that the title certificate is assigned to the lender as security in place of the vehicle itself, to prevent a valid sale of the vehicle without payment of the secured obligation. In such a transaction, the assignment or transfer of certificate of title may be effected in any way which the lender may deem satisfactory to him, provided the instrument effecting the hypothecation is sufficient in form, content and execution, the necessity for the statutory assignment or transfer required on the certificate itself not arising until the vehicle itself is sold or transferred by delivery.

February 7, 1946.—046-50.

MECHANICS' LIEN

QUESTION: Does Section 319.15, Florida Statutes, 1941, providing for the filing of liens upon motor vehicles include mechanics' liens for the cost of repairs, parts and labor expended upon the vehicle?

To Honorable George H. Asbell, Motor Vehicle Commissioner:

The statute in question has reference only to liens for purchase money or as a security for debt evidenced by written instrument in the form of retained title contract, conditional bill of sale or chattel mortgage. Unless the lien claimed by a mechanic for the cost of labor and parts employed and used in the repair of a motor vehicle is evidenced by some instrument in writing, signed by the owner of the vehicle and in the form prescribed by the statute, his lien upon the vehicle does not come within the terms of the quoted statute. The answer to the question is accordingly in the negative.

LICENSES

July 12, 1945.—045-186.

NONRESIDENT MILITARY PERSONNEL

QUESTION: Under the provisions of Public Act 415, 78th Congress, approved July 3, 1944, amending Section 514 of the Soldiers' and Sailors' Relief Act, is an automobile owned by a nonresident member of the armed forces and used by his wife, who is employed in a gainful occupation in Florida, exempt from securing a Florida license so long as the automobile bears a legal license issued by the state of the owner's residence?

To Honorable George H. Asbell, Motor Vehicle Commissioner:

Section 2 of the amendatory act of July 3, 1944, Public Law 415, 78th Congress, provides, with relation to its amendment to Section 514 of the Soldiers' and Sailors' Civil Relief Act of 1940, as follows:

"When used in this section (a) the term 'personal property' shall include tangible and intangible property, including motor vehicles, and (b) the term 'taxation' shall include but not be limited to licenses, fees or excises imposed in respect to motor vehicles or the use thereof"

It is my understanding that the motor vehicle in question is registered in the joint names of a member of the Armed Service and his wife. This creates an estate in the motor vehicle by entirety by virtue of which the entire ownership is in each of the joint owners. It can, therefore, be considered as a motor vehicle owned by the service man. As a motor vehicle owned by a member of the armed forces, it is, under the quoted federal statute, exempt from the imposition of a license fee by the State of Florida so long as it bears a legal license plate evidencing the payment of a license fee to the state which issued it. The vehicle itself being exempt under the federal law from the payment of a license tax in the State of Florida, that exemption is not destroyed by the fact that it is used by the wife, who is engaged in a gainful occupation.

I am of the opinion that the vehicle is not subject to license tax in Florida so long as it bears legal evidence of having been licensed in the state of the owner's residence.

August 25, 1945.—045-269.

EXEMPTION OF MEMBERS OF THE ARMED FORCES

QUESTION: Is a person who is a member of the armed forces of the United States exempt from payment of motor vehicle license tax if the vehicle bears a legal license plate issued by the state of his residence, even though he be engaged in a gainful occupation apart from his military duties?

To Honorable George H. Asbell, Motor Vehicle Commissioner:

This is in reply to your letter of August 27 to which you attach a letter addressed to your chief clerk by your deputy stationed at Key West, Florida. The letter of your deputy propounds the foregoing question.

It would appear that the person in question has been located in the State of Florida in connection with his military duties for a period of three years and that in addition to his military duties he is employed privately at a compensation of \$1.40 per hour, that his wife is also employed by the Navy Department, and that his two children attend school in Key West, one in the public schools and one in a Federal-operated school.

The Soldiers' and Sailors' Civil Relief Act of 1940, as amended by Congressional Act of July 3, 1944, provides that the personal property of any person who is domiciled in the State of Florida by reason of his compliance with military or naval orders is exempt from state taxation. The congressional act defines personal property to include motor vehicles and defined state tax to include any license, fee or excise imposed thereon. The exemption under the congressional act is conditioned that the person in question shall have paid the license, fee or tax upon his motor vehicle exacted by the state of his residence or domicile.

Under the plain terms of the federal statute, any person who is domiciled in the State of Florida, regardless of the length of time of such domicile, is not subject to the payment of a license tax upon a motor vehicle owned by him so long as the vehicle bears a valid license plate issued by the state of his domicile. This exemption is not qualified by the fact that he or members of his family may be engaged in gainful occupation or that his children may be students in the schools of Florida, public or private. The answer to the question is, accordingly, in the affirmative.

February 27, 1945.—045-66.

AUTO THEFT FUND—SCHOOL FUND

QUESTION: Does Chapter 22043, Acts of 1943, repeal the provisions in Section 319.08 and 320.22, Florida Statutes, 1941?

To Honorable George H. Asbell, Motor Vehicle Commissioner:

Sections 1 and 2 of Chapter 22043, Acts of 1943, read as follows:

"Section 1. That all monies in the state treasury credited to the motor vehicle refund fund be and the same are hereby transferred to and shall become a part of the following funds:

(a) All monies credited to the auto theft refund fund are transferred to and shall become a part of the auto theft expense fund, as provided by Section 319.08 of Florida Statutes, 1941;

(b) All monies credited to the motor vehicle license refund fund are transferred to and shall become a part of the county school fund of the State of Florida.

Section 2. All laws and parts of laws in conflict with this act be and the same are hereby repealed."

I am of the opinion that Chapter 22043, Acts of 1943, does not repeal Sections 319.08 and 320.22, Florida Statutes, 1941, inasmuch as the 1943 Act was enacted to cover only those funds then on hand at the time of the passage of the act.

November 25, 1946.—046-482.

TRANSPORTATION OF MATERIALS—EXEMPTION

QUESTION: Is a nonresident of this state using a passenger automobile with trailer attached for the transportation of materials to be used in the construction of a tourist camp, over the state highway, required to register the vehicles and affix state license plates thereto?

To Honorable George H. Asbell, Motor Vehicle Commissioner:

This is in reply to your letter of November 22 in which the above question is propounded. Under the facts set forth in your letter the person to whom you refer is engaged in an occupation in the State of Florida and is accordingly not entitled to the exemption from registration of his motor vehicles granted by statutes to a nonresident. The question is accordingly answered in the affirmative.

May 2, 1946.—046-186.

MUNICIPAL VEHICLES—LICENSE TAX—EXEMPTION

QUESTION: Is it permissible for a city to take title to an automobile or motorcycle belonging to an employee of the city for the purpose of securing an X tag?

To Honorable George H. Asbell, Motor Vehicle Commissioner:

The answer to this question is governed by the provisions of Section 320.10, Florida Statutes, 1941. The applicable section provides that the requirements for securing license plates shall not apply to any motor vehicle, trailer or semi-trailer owned and operated by any municipality of the State of Florida. The words "owned" and "operated" must be construed to mean exactly what they import; that is, that the vehicle in order to be exempt must actually be owned by and operated by the

municipality. The practice of assigning the certificates of title to motor vehicles to a municipality for the purpose of securing a tax exempt tag is not contemplated by the provisions of the section and is not authorized.

May 2, 1946.—046-185.

FARM TRAILERS—LICENSE FEES

QUESTION: Under the Motor Vehicle Law, is a farm trailer used exclusively for the purpose of transporting farm machinery, implements and supplies upon the highways of the state subject to registration and the payment of license fee?

To Honorable George H. Asbell, Motor Vehicle Commissioner:

The answer to this question is found in Sections 320.01 and 320.51, Florida Statutes, 1941. The former section defines a farm trailer as a vehicle without motor power which is drawn by a farm tractor and used principally for the purpose of transporting plows, harrows, fertilizer distributors, supply machines and other farm or grove implements which use the highways of this state only incidentally in connection with farm tractors. The latter section provides that farm tractors and farm trailers as defined in Section 320.01 shall be exempt from the provisions of the motor vehicle laws of this state.

The act must be construed as intending to exempt from the operation of the motor vehicle laws, in so far as registration and the payment of a license fee, all trailers used solely for the purpose of transporting farm machinery and equipment to and from farm properties and restricted to that use.

This would not include the use of a trailer for the transportation of farm products to market, or for the transportation of farm machinery, or appliances for a purpose other than actual use in the cultivation of the farm property.

October 19, 1945.—045-326.

ELECTRIC TROLLEY BUSES

QUESTION: Under the Motor Vehicle Act are buses propelled by electric power from overhead wires not operated upon fixed rails or tracks, subject to registration and license as motor vehicles?

To Honorable George H. Asbell, Motor Vehicle Commissioner:

Section 320.01, Florida Statutes, 1941, defines a motor vehicle as any vehicle operated over the public highways and streets of the state and propelled by power other than muscular power excepting such vehicles as are operated only upon a track. Section 322.01 defines motor vehicles as "every vehicle which is self propelled and every vehicle which is propelled by electric power obtained from overhead trolley wires but not operated upon rails." Section 320.08 of the Florida Statutes fixes a license fee upon automobiles for hire of varying capacities in numbers of passengers.

Construing the statute in the light of statutory definitions, a motor bus employed as a carrier of passengers operated by electric power transmitted to the bus from overhead wires by means of a trolley is subject to registration and the imposition of a license tax in the same class as other motor buses operated by other power.

September 26, 1945.—045-297.

NONRESIDENT OWNERS—TAX

QUESTION: Are motor vehicles owned and operated by a nonresident company having its principal place of business in the State of Georgia, subject to Florida license tax when used by said nonresident company and its employees in the operation of a clay pit located in the State of Florida, and in the mining of raw material from said pit, to be transported to the company's plant in Georgia for processing?

To Honorable George H. Asbell, Motor Vehicle Commissioner:

The answer to this question requires interpretation of Section 320.37, Florida Statutes, 1941, governing the registration of motor vehicles by nonresidents. This section provides that the registration and display of license number plates shall not apply to a motor vehicle owned by a nonresident of this state, other than a foreign corporation doing business in this state, with certain limitations. If the answer to the question depended upon interpretation of this section alone, the exemption of the foreign company would not be available under the statute.

The State of Florida and the State of Georgia have, however, entered into a reciprocal agreement with regard to the operation of motor vehicles upon their respective highways, which does have a bearing upon your inquiry. Paragraph 3 of the reciprocal agreement provides that certain motor vehicles owned by residents of the respective states and employed in the transportation of goods, merchandise, etc., also owned by the owner of the vehicle may be operated in the respective states without registration or license plate of the state other than the state of residence, but contains a proviso that when the resident of either reciprocating state shall establish a place of business in the other state, all motor vehicles operated solely in the conduct of such business shall be registered in accordance with the laws of the state in which the business is located.

The reciprocal agreement applies to persons, firms and corporations, legal residents of or maintaining principal offices in either of the reciprocating states. The provision in Paragraph 3 imposing a privilege or license tax upon motor vehicles in cases where a nonresident shall establish a place of business in the other state presents the question whether the acquisition and the operation and development of a clay pit in the State of Florida by a concern engaged in the business of processing clay in the State of Georgia is the establishing of a place of business in the State of Florida. Inasmuch as the pit located in the State of Florida is undoubtedly an instrumentality of the business of the nonresident, it is my opinion that the development of the product from the Florida pit and the transportation of it to the plant in Georgia constitutes the establishment of a place of business in Florida so as to take the operation out of the terms of the reciprocal agreement exempting motor vehicles from the imposition of privilege or license taxes.

Section 320.38, Florida Statutes, 1941, deals with the exemption of motor vehicles operated in Florida by nonresidents and provides that when such vehicles shall be duly registered or licensed under the laws of some other state, the nonresident exemption shall not apply to any person who shall accept employment or engage in any trade, profession or occupation within the State of Florida. This section has been construed by the supreme court to apply to a nonresident engaged in the business of delivering poles and logs cut in Alabama over Florida highways to purchasers in Florida by means of motor vehicles, holding that such a nonresident is not entitled to exemption from registering his vehicle in Florida.

Under the provisions of the two quoted sections, it is my opinion that motor vehicles used as a means of transportation by persons em-

ployed by a nonresident concern in the operation or development of a clay pit in the State of Florida would be subject to registration in Florida and required to display a Florida tag, even though such employees might have their places of domicile without the State of Florida. The question is, accordingly, answered in the affirmative.

September 5, 1945.—045-281.

LICENSE TAX ON MOTORCYCLES

QUESTION: Is an ordinary bicycle to which there is attached an extra wheel operated by a gasoline motor and used as a means of propulsion in addition to means of propulsion by muscular power, such a motor vehicle as requires the issuance of a license for the privilege of its operation?

To Honorable George H. Asbell, Motor Vehicle Commissioner:

The only statutory definition of a motorcycle appears in Section 320.01, Florida Statutes, 1941, in which it provides: "Motor vehicles include automobiles, motorcycles, motor trucks, etc., etc." Section 320.08 fixes the license fee for motorcycles at \$5.00 flat. This section further fixes the license fee for automobiles, trucks, trailers and other motor vehicles but does not particularly classify bicycles operated by motor power unless it was the intentment of the legislature to classify such bicycles as motorcycles.

The dictionary definition of a motorcycle is "a bicycle propelled by a motor." The United States Circuit Court of Appeals in an opinion involving the definition of a motorcycle defines it as "a bicycle propelled by a gasoline engine located in the frame between the wheels. The power is transmitted to the rear or the traction wheel by some sort of transmission or action."

The Driver's License Law of this state defines a vehicle as "every device upon or by which any person or property is or may be transported or drawn upon the public highway, except devices moved by human power, etc."

A wheel operated by a motor which may be attached to or detached from a bicycle at will and serves the purpose of supplementing muscular power as a means of propelling a bicycle to which it may be attached, does not, in my opinion, convert an ordinary bicycle into a motor vehicle, as defined by the Motor Vehicle Act.

The law imposing a tax or license fee for the privilege of using or operating a vehicle is subject to strict construction. It is my opinion that the Motor Vehicle Act providing for a license fee for the privilege of operating a motorcycle is intended to apply only to such a vehicle or contrivance as is generally known by trade name and usage as a motorcycle, that is, a vehicle manufactured as a motorcycle not susceptible of operation or propulsion except by means of a motor. The above question is, therefore, answered in the negative.

July 18, 1945.—045-191.

FOUR-WHEEL TRAILERS—MAINTENANCE TAX AND TAG

QUESTION: Are the operators of four-wheel trailers required to secure a maintenance tag?

To Honorable George H. Asbell, Motor Vehicle Commissioner:

This is in reply to your letter of July 14 wherein the above question is propounded. Maintenance tags are required to be secured for trucks

and semi-trailers exceeding certain weights. This tax is not specifically imposed upon four-wheel trailers (Section 320.73, Florida Statutes, 1941). The law provides that no four-wheel trailer equipped with pneumatic tires shall be operated on a public highway outside the limits of an incorporated city carrying a load of more than 16,000 pounds. There is no provision authorizing the operation of the four-wheel trailers carrying a load in excess of the weight specified. Inasmuch as maintenance tags are required only upon vehicles of specific description weighing in excess of the prescribed weight, it is my opinion that the existing statutes do not require or provide for the issuance of maintenance tags upon four-wheel trailers. The question is, therefore, answered in the negative.

May 28, 1946.—046-266.

FOR HIRE TAG—RENTED AUTOMOBILE

QUESTION: Does a motor vehicle owned by one person, leased to another person for a consideration, to be used by the lessee for the transportation of his own property, require a "for hire" license plate as a condition to its operation on the public highways?

To Honorable George H. Asbell, Motor Vehicle Commissioner:

Section 320.36, Florida Statutes, 1941, governing the issuance of "for hire" certificates, provides:

"No person may rent, lease, hire or offer for rent, lease or hire, by advertising same in a newspaper or in any other manner, any automobile which has not at the time of such rent, lease or hire, attach thereto the "for hire" license tag required by the laws of this state for automobiles for hire. Any person who violates this provision of this section shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not exceeding five hundred (\$500.00) dollars, or by confinement in the county jail, not exceeding six months."

The question presented comes within the above quoted provision of the statute. No person renting or leasing a motor vehicle from the owner thereof may lawfully operate the same upon the public highways of the state without having first secured a "for hire" certificate and attaching thereto a "for hire" license tag.

The question is accordingly answered in the affirmative.

November 22, 1946.—046-478.

USED CAR SALE—AUCTION—AGENT

QUESTION: Is a person or organization engaged in the sale of used motor vehicles by auction as an agent for the owners of the vehicles required to secure a used car dealer's license?

To Honorable George H. Asbell, Motor Vehicle Commissioner:

This is in reply to your letter of November 19 with which you submitted a newspaper advertisement of sales at auction of used motor vehicles by auctioneers acting as agent for private owners and used car dealers. From the specimen advertisement submitted, it would appear that the organization by whom the sales are conducted merely acts in the capacity of an auctioneer having no interest or ownership in the used motor vehicles sold other than that of an agent for the owners. Under these circumstances, it is not necessary that the auctioneer should secure a used car dealer's license.

July 12, 1945.—045-182.

PERMIT TO OPERATE MOTOR VEHICLE FOR HIRE

QUESTION: Are motor vehicles registered under the name of Florida owners, used by the owners in the transportation of goods from another state into Florida under lease agreement, subject to that section of the motor vehicle statute requiring the securing of a permit and for-hire license?

To Honorable George H. Asbell, Motor Vehicle Commissioner:

I have carefully studied the specimen lease agreement attached to your letter of inquiry, and in my opinion it is not a sufficient basis upon which the vehicle owners may claim exemption from the operation of the statute requiring that they secure for-hire permits. The form of lease agreement submitted lacks vital characteristics necessary to constitute a bona fide lease.

It clearly appears that the relationship between the nonresident distributor and the resident vehicle owners is one of employment for the transportation and delivery of goods by motor trucks. Contracts of the nature of the subject lease agreement have been universally repudiated by judicial decision as mere artifice to avoid the application of provisions of law governing the operation of motor vehicles for hire upon public highways.

In my opinion, the question is answered in the negative. The owners of the vehicles should be required to secure for-hire permits as provided by Section 323.05, Florida Statutes, 1941.

January 26, 1946.—046-30.

"C" TAGS FOR BUSES

QUESTION: May "C" Series tags be issued for vehicles employed in the transportation of laborers to and from defense areas which are located at a greater distance than ten miles from the territorial limits of cities?

To Honorable George H. Asbell, Motor Vehicle Commissioner:

The issuance of "C" series license plates is by law confined exclusively to motor vehicles classified as buses and passenger cars operated wholly within the limits of cities or within a radius of ten miles thereof. There is no provision of the statute which would authorize the issuance of "C" series plates except to the class of vehicles described. Buses and passenger cars and like motor vehicles operated for the transportation beyond the limits fixed by the statute are subject to the license charges prescribed by statute for "F" series or "S" series license plates. The question is, therefore, answered in negative.

August 2, 1946.—046-331.

MUNICIPAL BUSES—EXEMPTION

QUESTION: Under the motor vehicle law into what classification series of license plates do buses owned and operated by a municipal corporation for the purpose of transportation of passengers within the limits of the municipality and an area of ten miles thereof fall?

To Honorable George H. Asbell, Motor Vehicle Commissioner:

Section 320.08, Florida Statutes, 1941, describing classification series of motor vehicles employed in various uses, provides:

"Local buses "C" series: Buses and passenger cars operated wholly within city or within ten miles thereof \$1.50 per cwt."

Section 320.10 exempts from the operation of Section 320.08 certain vehicles, including:

"Neither shall the provisions of said sections apply to any motor truck, trailer or semi-trailer owned and operated by the State of Florida or any county or any municipality of the State of Florida."

The legislative intent is clear to exempt only such vehicles as are expressly named in the exemption section of the law. Local buses are not included within the exemption.

Aside from the provisions of the motor vehicle law, passenger buses owned and operated by a municipality for the purpose of transporting for hire passengers within the corporate limits and within an area of ten miles thereof surrounding the corporate limits are not exempt from the imposition of a license tax because of the fact that they are owned and operated by a municipality. Under the general law, only such property owned by a municipality is entitled to exemption from taxation as is owned and used in the discharge by the municipality of a governmental function. The operation for hire of passenger buses by a municipality is not a discharge of any governmental purpose or in the exercise of any governmental function.

Buses owned and operated by a municipal corporation for the purpose of transportation of passengers for hire within the limits of the municipality and within a radius of ten miles thereof fall within the series classification prescribed by statute and designated as series "C".

January 26, 1946.—046-37.

SALE OF LICENSES—SPECIAL NUMBERED TAGS

QUESTION: What date is fixed by law after which the motor vehicle commissioner or his agents shall receive applications for annual renewal of registration certificates and issuance of license plates bearing specifically selected numbers?

To Honorable George H. Asbell, Motor Vehicle Commissioner:

December 1 of each year is fixed by law as the date upon which the sale of license number plates by the motor vehicle commissioner or his agents for the ensuing year shall begin. There is no provision of law under which the commissioner or his agents are required or authorized to accept applications for renewal registration for the ensuing year.

The law provides that upon application of any person accompanied by a fee of \$1.00 in addition to all other costs and charges for the issuance of an automobile license plate, the motor vehicle commissioner or the tax collector may issue a license plate bearing a particularly selected number. The application for a selected number plate is required to be made when the application for renewal of registration is made. Since the date fixed for the receipt of applications and the sale of license number plates is December 1 of each year, applications should not be received prior to that date, and since applications for specially selected number plates are required to be made with the application for renewal of registration, it is clear that application should not be accepted prior to the effective date of the act.

The answer to the question is, therefore, that applications for specially selected numbers should not be received in advance of December 1 of each year.

This, however, does not mean that you may not receive informal or unofficial applications for the purpose of giving priorities to certain requested numbers.

January 26, 1946.—046-36.

TAG SALE FEES—MINIMUM COMPENSATION

QUESTION: Under Chapter 23149, Laws of 1945, are the license service charges collected by a retiring tax collector from the first day of the license year to the date of his retiring from office to be charged against the successor tax collector in auditing the report of the licenses sold by the agency during the license year, for the purpose of determining the amount to be paid from the motor vehicle expense fund to make up the deficit between the amount of service charges collected and the minimum compensation of \$500 fixed by statute?

To Honorable George H. Asbell, Motor Vehicle Commissioner:

Chapter 23149, Laws of 1945, amended Section 320.04, Florida Statutes, 1941, in one particular, namely, by providing a minimum amount of compensation to be allowed to the several tax collecting agencies for services rendered in the issuance of license plates. The statute directs that a minimum of \$500 per license year shall be received by each tax collecting agency for such service. This must be construed to mean each tax sale agency shall receive as compensation for services the minimum amount specified, and not that the particular incumbent who may have actually made the sale, of which there might be several, is entitled to receive the minimum compensation provided by the act.

The statute requires that reports shall be made to the motor vehicle commissioner as soon after the close of the license year as is practicable, which report shall record all sales of tags made during the past license year. There is no provision for the making or for the receiving of any report during the license year. The examination and audit of the report by the motor vehicle commissioner is directed to be made upon the report for the entire license year. Such audit should, therefore, be made upon the entire number of tags sold during the license year and any money required to be paid to the reporting agency in order to make up a deficit of service charges under the \$500 minimum should be paid to the tax collector who is in charge of the agency at the time the audit is completed.

The question is, therefore, answered in the affirmative.

HIGHWAY PATROL

April 15, 1946.—046-156.

BAIL BOND—ACCEPTANCE BY PATROLMEN

QUESTIONS: 1. Is the bail bond issued by a surety company authorized to transact business in the State of Florida a good and sufficient bond within the meaning of Section 321.05, Florida Statutes, 1941?

2. Is it the compulsory duty of a highway patrolman upon making an arrest under the provisions of Section 321.05, Florida Statutes, 1941, to accept as bail a bond issued by a surety company authorized to transact business in the state?

To Honorable H. N. Kirkman, Director, Department of Public Safety:

Section 903.15, Florida Statutes, 1941, authorizes surety companies licensed to transact business in the State of Florida to execute bail bonds. The first question is, therefore, answered in the affirmative.

Section 321.05, Florida Statutes, 1941, vests all officers of the Florida Highway Patrol with the power to bear arms and to make arrests of persons violating traffic laws. The quoted section further directs that upon making arrests the patrol officer shall immediately conduct the accused to the county seat and deliver him into the custody of the sheriff

or to obtain from such person arrested a good and sufficient bond, requiring his appearance before the proper judicial officer of the county to answer the charge for which he was arrested. My interpretation of this statute is that a person arrested has the right to his release upon arrest by furnishing bail bond, and since a bail bond executed by a surety company is proper and sufficient under the statutes, upon the furnishing of such bond by the person arrested, it is the duty of the patrolman to release him. Accordingly, if a bond obligation properly executed by a surety company authorized to do business in the state by or through an authorized agent of the surety company and bearing the corporate seal of the corporation is presented, the arresting officer is obliged to accept the same. The authenticity and sufficiency of the execution of such a bond is, however, a matter which should be demonstrated to the satisfaction of the patrolman as a condition precedent to his acceptance and approval of the same. He should be justified in refusing to accept such a bond in the absence of written proof of the authority of the agent or attorney of the surety company to execute it.

April 1, 1946.—046-127.

DEPARTMENT OF PUBLIC SAFETY—OWNERSHIP OF LAND

QUESTION: Can the Department of Public Safety of Florida legally purchase and own lands, and if so are there any restrictions or limitations upon its authority?

To the Executive Board, Department of Public Safety:

It is recognized that the purchase of property for the state is distinctly a legislative function which may within appropriate limitations be exercised by government administrative agencies. It is also recognized that to lawfully delegate the authority to an administrative agency for purchasing real estate and holding the title to same, the legislature must subject the power so delegated to proper safeguards, such as examination, audit and approval by higher state officers.

I respectfully advise that the language of Section 321.01, Florida Statutes, 1941, is interpreted by me to be specially comprehensive to include authority in the executive board of the Department of Public Safety of the State of Florida to purchase real estate to be held in the name of the State of Florida for the use and benefit of the Department of Public Safety. Provided, however, that upon any such purchase being considered before the same can be legally made it must be approved by the executive board of the said department as to location, cost and use, as well as necessity to purchase the same, because of its acquisition being essential to the proper administration and enforcement of the law creating said department and providing for its operation.

July 19, 1946.—046-309.

PATROL VEHICLES—COLOR SIMILARITY

QUESTION: What is the legal interpretation of the words "similar color" or "colors" as used in Section 321.03, Florida Statutes, 1941?

To Honorable H. N. Kirkman, Director, Florida Highway Patrol:

The quoted section imposes a penalty upon any person who shall color or cause to be colored any motor vehicle or motorcycle the same or similar color as the color or colors prescribed for the Florida Highway Patrol vehicles. The word "similar" has been legally defined to mean having or bearing a resemblance or likeness to some object or thing. The word "similar" does not import exactly alike, but means having a marked resemblance thereto or of the same general character or appearance.

It has been held that one thing has a resemblance to another when it closely corresponds thereto or has a general likeness to some other thing, although in some instances the word has been given the meaning of exact likeness. It is the purpose of the quoted section to prevent any person from using in the decoration of a motor vehicle the same general color and design adopted by the Highway Patrol. This does not mean that the same color may not be used if the same design is not adopted. The interpretation of the act is that legally placed upon statutes prohibiting counterfeiting, it being the intentment to prevent any person from so decorating an automobile or a motorcycle in such a manner that it bears a sufficient likeness to the color and design adopted by the Highway Patrol as to reasonably deceive any person to assume that it is a patrol vehicle.

November 3, 1946.—046-469.

ARREST—DELIVERY OF EVIDENCE TO SHERIFF

QUESTIONS: 1. When an arrest is made by a patrol officer other than that covering the regulation of traffic or public safety upon the highways and where evidence is seized pertinent to the case in question, is it the duty of the patrol officer to turn that evidence over to the sheriff of the county in which the arrest is made for safe-keeping, taking a receipt for same?

2. Where a patrol officer arrests a defendant in possession of a stolen car, is he required to turn the car over to the sheriff of the county in which the arrest is made for safe-keeping and take a receipt for same?

To Honorable Hugh Culbreath, Sheriff, Hillsborough County, Tampa, Florida:

The answer to the two questions which are presented is found within the provisions of Section 321.05 of Chapter 321, Florida Statutes, 1941, which authorizes members of the Florida Highway Patrol to make arrests. The statute from which the subject section is derived, directs that upon the making of an arrest, the patrolman shall immediately conduct the culprit to the county seat and deliver him to the sheriff of the county wherein the arrest is made, or that the patrolman obtain from the person apprehended a good and sufficient appearance bond.

While the statute is silent as to the duty of the patrolman with respect to the disposition of any property which the culprit may have in his possession, the plain intentment of the statute is that such property be delivered, with the person of the culprit, to the sheriff.

Both of the questions are accordingly answered in the affirmative.

DRIVERS' LICENSES

August 29, 1945.—045-272.

AMENDMENT TO DRIVERS' LICENSE ACT—EFFECTIVE DATE

QUESTION: Under the amendment to Section 322.21, Florida Statutes, 1941, enacted by the legislature of 1945 and becoming effective June 11, 1945, may the collection of the increased license fees provided for in the amendment be postponed until the expiration of the present license year?

To Captain Olin Hill, Acting Director, Department of Public Safety:

Chapter 22838, Acts of 1945, being an act to amend Section 322.21, Florida Statutes, 1941, prescribes a new scale of fees to be charged and exacted for the issuance of licenses for the operation of motor vehicles.

The amendment by its terms provides that it shall take effect immediately upon its becoming a law. The amendment became a law on June 11, 1945 without the governor's approval and was on that date filed in the office of the secretary of state.

From and after the 11th day of June, 1945, county judges had the right to collect the license charge prescribed by this law, and, of course, where such was done they would be entitled to the fee allowed under the 1945 act, but unless their license collection from the applicant for the license was predicated upon the 1945 act, they could not charge as their fee the increased amount provided for in such 1945 act for such fee.

The reason I say above that the county judge "may" collect the increased 1945 license charge, rather than "must," is that I understand the occasion for your inquiry for this opinion arises because of one county judge in the state insisting upon payment to him of the fee for licenses issued by him subsequent to June 11, 1945, which the 1945 act prescribes; whereas it was understood from the president of the County Judges Association previous to the passage of this 1945 act that all county judges would issue the licenses in question under the old law up until October 1, 1945, and would charge the old law fee for so doing. Of course, under the terms of the 1945 act the license fee of that act should have been charged subsequent to June 11, 1945, but if it wasn't by virtue of the understanding and agreement nobody was hurt except the state revenue and the license payor would be the beneficiary therefrom.

Inasmuch as the sales of the licenses and the collection of the sales agent's fee is a matter under the law for the county judges to carry out, I repeat that a county judge who sold the license under the old law cannot claim to be entitled to the fee prescribed under the new law, and this, to me, is the real question with which you are confronted. Of course, if any judge issues licenses under the new law after June 11, 1945, he is entitled to the fee accordingly.

September 14, 1945.—045-289.

REVOCATION OF LICENSES—RESTORATION

QUESTION: Several automobile operators have had their drivers' licenses revoked in Flagler county for a period of one year. In several instances the parole commission has restored the operators' license on a restricted basis covering a longer period of time than that for which the license was revoked, but, after the restoration order was entered by the parole commission, the operator refused to accept the license on the restricted basis and said operator now expects to get full unrestricted license after the one year period of revocation has expired. Is he entitled to same?

To Honorable E. W. Johnston, County Judge, Flagler County, Bunnell, Florida:

When you revoked the said license I assume that you did so because of one or more of the grounds set forth in Section 322.26, Florida Statutes, 1941.

Such a revocation terminates the operator's privilege to drive a motor vehicle under that license.

Said operator was not compelled to accept the restricted license offered him by the parole commission unless he desired to operate his motor vehicle.

The operator whose license has been revoked may, at the end of one year from said revocation, apply to the Department of Public Safety for a new license. The Department of Public Safety can give him an

unrestricted license, or it may, because of certain conditions, give him a restricted license. See Section 322.16, Florida Statutes, 1941. It is not for the operator to say whether he will get an unrestricted or restricted license. This will depend upon the decision of the Department of Public Safety as governed by said Section 322.16, Florida Statutes, 1941.

September 12, 1946.—046-387.

REVOCATION—LENGTH OF TIME

QUESTIONS: 1. Is the Department of Public Safety authorized to revoke licenses issued for the operation of a motor vehicle for a period in excess of one year?

2. May the period of suspension or revocation of a license to operate a motor vehicle be extended as a penalty for the operation of a motor vehicle during the period for which a license to so operate has been suspended or revoked?

To the Department of Public Safety, Tallahassee, Florida:

Section 322.28, Florida Statutes, 1941, provides that the department shall not suspend a driver's license for a period of more than one year, and upon revoking a license shall not in any event grant a new license until the expiration of one year after such revocation.

Under the provisions of the quoted section, the department is not authorized to suspend the effectiveness of a driver's license for a period of more than one year. It may make such suspension effective for any period of time less than one year. Upon the revoking of a license the department is not authorized to grant a new license to the holder of the revoked license until the expiration of one year after the date of such revocation.

Section 322.05, Florida Statutes, 1941, provides that the department shall not issue any driver's license "to any person when the director has good cause to believe that the operation of his motor vehicle on the highways by such person would be detrimental to public safety or welfare." Under these sections of the statutes the department upon the revocation of a license may not issue a new license until the expiration of one year after the date of such revocation, but if the director of the department has good cause to believe that the operation of a motor vehicle by the licensee would be detrimental to public safety or welfare, he may in his discretion extend the period of revocation indefinitely.

Accordingly, the answer to this question is that under justifiable circumstances the license to operate a motor vehicle may by the director be indefinitely postponed; provided, however, that the period of revocation shall not in any instance be less than a period of one year.

Section 322.34, Florida Statutes, 1941, makes it a misdemeanor for any person whose driving license shall have been suspended or revoked to drive any motor vehicle upon the highways of the state during the period within which such license or privilege has been revoked, and further provides for a penalty to be imposed for such act by way of fine and imprisonment. The governing statute does not in terms provide for an additional penalty by way of suspension or revocation of a license for the violation of the provisions of Section 322.34. Section 322.27 provides that the department is authorized to suspend the license of an operator without hearing if it is found that he is among other things "an habitual violator of the traffic laws." If the department director under the quoted section should determine that an applicant for a license is an habitual violator of the traffic laws, as is evidenced by the fact that he has after

having his license suspended violated the law by operating a motor vehicle without a license, the director is empowered to penalize such violation by an extended suspension of his right to a license not to exceed one year from the commission of the offense.

AUTO TRANSPORTATION COMPANIES

September 13, 1946.—046-386.

HOUSE MOVING—FOR HIRE LICENSES

QUESTION: Are trucks owned and operated in connection with the conduct of a business of moving houses and buildings subject to the payment of license fees imposed upon trucks for hire?

To Honorable George H. Asbell, Motor Vehicle Commissioner:

Acknowledgment is made of your letter of September 12 with which is attached copy of letter addressed to you wherein the foregoing question is presented.

The Supreme Court of Florida in the case Travis vs. Fry, reported in 190 So. Rep. 793, answered this question affirmatively.

In the cited case the court held persons owning and operating trucks under the circumstances recited in the letter addressed to you, wherein this question is presented, are a transportation company under the provisions of Chapter 323, Florida Statutes, 1941, and subject to the provisions of that chapter. The court further held that such persons were engaged in the operation of trucks for hire within the provisions of Chapter 320, Florida Statutes, 1941, and subject to the provisions of that chapter. The question is accordingly answered in the affirmative.

CHAPTER XIX

AVIATION

AIRPORT LAW

April 30, 1946.—046-180.

COUNTY AIRPORTS—LEGAL CONTROL

QUESTIONS: 1. May a county which, through its governing body, has acquired and operates an airport, in pursuance of authority of Chapter 22846, Laws of Florida, Acts of 1945, prescribe penalties and institute prosecutions with respect thereto for violation of rules and regulations adopted by said governing body for the management, government and use of such airport?

2. If the answer to the preceding question is in the negative, how may the county enforce such rules and regulations?

To Mr. William C. Lazarus, Aviation Supervisor, State Improvement Commission:

Section 2 of Chapter 22846, Laws of Florida, Acts of 1945, empowers a "municipality" to acquire and operate an airport. Section 1 (a) of said chapter defines "municipality," as used in said act, as meaning any county, city, village or town of the state. Section 8 of said chapter, in addition to general powers granted in the act names additional specific powers of a "municipality," among which is the authority set forth in subsection (b) of said Section 8, "to adopt and amend all needful rules, regulations and ordinances for the management, government and use of any properties under its control, whether within or without the territorial limits of the municipality; to appoint airport guards or police, with full police power; to fix by ordinance or resolution, as may be appropriate, penalties for the violation of said rules, regulations and ordinances, and enforce such penalties in the same manner in which penalties prescribed by other rules, regulations and ordinances of the municipality are enforced."

These provisions of said Section 8 (b), as applied to a municipal corporation, are appropriate and understandable; but the application of such provisions to a county leads to uncertainties.

It is the general rule that regulations promulgated by an administrative board shall be enforced in the manner provided in the law granting the power to regulate. The only specific provision in said Chapter 22846 for the enforcement of such rules and regulations is found in the above quoted provisions of said Section 8 (b). An administrative board may not impose penalties for violation of its rules and regulations which constitute criminal sanctions; only the legislature may impose such sanctions. *State vs. A. C. L. R. Co.*, 56 Fla. 617, 47 So. 969; *Bailey vs. Van Pelt*, 78 Fla. 337, 82 So. 789; *United States vs. Grimand*, 220 U. S. 506, 55 L. Ed. 563; 42 Am. Jur. 355, Sec. 50. While criminal sanctions may not thus be initiated by the county, it would seem the legislature properly could have provided in the act that violation of a regulation promulgated by the county within the authority of said Section 8 (b) should constitute a described offense with stated penalties. For example, see Section 13, Chapter 23097, Laws of Florida, Acts of 1945. However, the legislature made no such provision in the act under consideration here.

It is also doubtful that continued violation of such a rule or regulation would constitute a nuisance as defined by Section 823.01, either as a

criminal offense as therein provided, or which could be enjoined by those persons described in Section 64.11, Florida Statutes, 1941.

It is recognized that if a county is to operate an airport, the welfare of the general public using it requires the promulgation of reasonable rules and regulations with respect thereto, as contemplated by said Section 8 (b). It is strongly arguable that the legislative grant of power to operate an airport and to make reasonable rules and regulations concerning the same implies the power to enforce such rules and regulations in some effective manner. Yet, it is apparent that nothing short of criminal sanctions could fully meet the necessity for such regulatory measures. However, it is remarked that while no case directly in point has been found, persuasive reasoning that a county might resort to a court of equity to require observance of such rules and regulations by injunction is presented by the following cases: *Town of Lexington vs. Miskell* (Mass.), 159 N. E. 598; *Clinton vs. Donnelly* (Ia), 213 N. W. 202; *State ex rel. Jackson vs. Lindsay*, 85 Kan. 79, 116 Pac. 207; *Wells vs. New Orleans*, 32 La. Ann. 676; *Quincy vs. Kennard*, 151 Mass. 563, 24 N. E. 860.

In view of the foregoing, it appears the above questions properly are answered in their numbered order as follows:

(1) The first question is answered in the negative. Since criminal sanctions appear to be the most effective means of enforcing observance of such necessary rules and regulations; it is suggested that at the next session of the legislature the act should be amended to provide that violation of such rules and regulations should constitute a crime punishable as may be provided in said suggested amendatory act.

(2) It may be that resort might be had to a court of equity to restrain continued or threatened violations of such rules and regulations; but whether such a suit will lie may be determined only upon the presentation of the question to the court in an actual suit.

CHAPTER XX

HIGHWAYS, BRIDGES AND FERRIES

STATE ROADS

June 8, 1945, as amended

July 6, 1945.—045-136.

STATE ROAD DEPARTMENT—COMPENSATION OF MEMBERS

QUESTION: From what date is the compensation of the chairman and members of the State Road Department payable under Chapter 22859, Laws of Florida, Acts of 1945?

To Honorable T. M. Shackelford, Jr., State Road Department:

To Honorable Calvin Johnson, State Road Department:

The above chapter became a law without the governor's approval, on June 11, 1945, and by its terms became effective the same day. The said law provided that the chairman of the department "shall, from the date of qualifying as such chairman, be allowed and paid a salary of eight thousand dollars per annum."

It appears from the journals of the legislature that the bill did not pass the house by the necessary two-thirds majority required, under Section 11, Article XVI, of the state constitution, to give it retroactive operation for services already performed. The law is, therefore, only prospective in its operation.

It is, therefore, my opinion that the salary of the chairman of the State Road Department is payable from the date the above chapter became a law and not from the date of his qualification as such chairman.

I am further of the opinion that the salary of the other members, and the expenses payable under said Chapter, are payable from the date the act became a law.

NOTE: See State ex rel. Bayless v. Lee, recently pending in the Supreme Court.

April 16, 1946.—046-162.

FEEDER ROADS—USE OF SUCH FUNDS

QUESTION: May funds allocated to a county or road district for the construction and maintenance of secondary and feeder roads, including farm-to-market roads, be expended by the State Road Department for the construction and maintenance of state roads in the county or district?

To the Trustees of the Special Road and Bridge District, No. 1, Alachua County, Gainesville, Florida:

Section 341.62, Florida Statutes, 1941, being Chapter 23081, Laws of 1945, authorizes the State Road Department to cooperate with and enter into contracts with the county commissioners of the several counties and the governing authorities of the various municipalities in the state for the construction of roads on the principal, secondary and feeder roads, including farm-to-market roads, etc., with the proviso, however, that the system of such roads selected by the State Road Department in

cooperation with the county commissioners of the several counties and the governing authorities of the several municipalities shall be subject to the approval of the United States Commissioner of Public Roads. Under the statute, it becomes the duty of the State Road Department, in cooperation with the county authorities and the federal authority, to select and designate a system of secondary and feeder roads, including farm-to-market, to be constructed and maintained with federal aid under the provisions of the statute. If, in the selection of such roads, it occurs that a road which has been designated by the legislature as a State road is included, the available funds may be expended upon that road as a part of the system of secondary and feeder roads. Your question is accordingly answered in the affirmative, in the instance here specified.

COUNTY ROADS AND BRIDGES

August 26, 1946.—046-362.

OVERFLOW—DUTIES OF COMMISSIONERS

QUESTION: What are the duties of the board of county commissioners relative to the overflow situation which has occurred in Clay county in the Lake Geneva area due to the unprecedented rainfall of the last months?

To Honorable D. E. Pangborn, Keystone Heights, Florida:

I realize the desperate situation in which some of the property owners in your county have found themselves due to these flood conditions. I have, therefore, contacted the State Road Department and the engineer for the Trustees of the Internal Improvement Fund in an effort to familiarize myself with the situation. I have received from the said drainage engineer a report on the conditions in this flooded area and I am attaching hereto a copy of that report.

From all the information I can get of the situation, in my opinion, it is beyond the duties of the county commissioners of Clay county to attempt to drain this area. In other words, I do not find that it is a county question, neither do I find it a state question. Frankly, it seems to be a question which the property owners within the affected area must take care of. I think that they have ample law for this, to wit: our General Drainage Law, and I would suggest that the property owners affected at once seek to organize themselves into a conservation district under this law with the view of a long-range program to correct these conditions. I believe it will be found that it will be not only the territory in Clay county which must be included in such a district but the territory from Clay county eastward perhaps as far as the St. Johns river. This, of course, would have to be determined by the engineer's report.

I find from all of my investigations that these flood conditions now prevailing result from natural causes and that no artificial works either of the state or the county contribute toward these conditions and for this reason neither the state nor the county is involved and further that Chapter 343 of the Florida Statutes, 1941, has no force or effect in this situation.

CHAPTER XXI

RAILROADS AND OTHER REGULATED UTILITIES

RAILROAD COMMISSIONERS

September 19, 1945.—045-301.

SPECIAL COUNSEL AND FREIGHT RATE EXPERTS—COMPENSATION

QUESTION: Is the railroad commission authorized to pay for services to be rendered it by special counsel in the so-called Southern Governors' Class Rate case and defray the costs of printing an answer and supporting brief therein from funds in the "Fees and Charges" item of its current expense budget derived from three sources, namely: (1) a \$3.00 fee paid to the Commission by applicants to practice before it, (2) a \$0.50 fee paid to the Commission for a distinguishing plate for each motor vehicle operated under its jurisdiction and (3) a \$50.00 fee paid to the commission by each applicant for a certificate of public convenience and necessity?

To Honorable Eugene S. Matthews, Chairman, Florida Railroad Commission:

It is my information that the Southern Governors' Class Rate case to which you refer is docket No. 28300, the class rate investigation instituted by the Interstate Commerce Commission on its own motion to investigate allegedly excessive, unjust, unreasonable and discriminatory rates fixed by transportation companies engaged in interstate business in what is referred to as southern territory, including the State of Florida; that pursuant to Section 350.66, Florida Statutes, 1941, requiring that when such conditions exist "the commission shall present the facts to the interstate commerce commission and appeal to it for relief," special studies were made under the direction of the railroad commission of the rates embraced in said investigation of the Interstate Commerce Commission; that the State of Florida through its governor and the railroad commission became a party to the proceeding under docket No. 28300 in the relationship of an intervener and not only participated in such proceeding in conjunction with the southern governors but also filed a separate brief placing primary emphasis on the abolition of the so-called Florida "arbitraries"; that recently the Interstate Commerce Commission entered its order in favor of the position taken by the southern governors, the State of Florida and the railroad commission and that certain northern and eastern railroads, political subdivisions and others have filed objections to such order asking for a rehearing and reargument and the railroad commission desires to file an answer and supporting brief to such objections. Moreover, you want this done by the special counsel who is already well acquainted and versed in the various aspects and ramifications of the proceeding.

It appears that in the circumstances outlined in the preceding paragraph there is no doubt about the right to employ special counsel in such a proceeding and that this was done and he represented the railroad commission and the State of Florida therein until the entry of the order. For such services such special counsel was paid from appropriations made by the legislature for the purpose of defraying the expenses incident, among other things, to such proceeding. But the last legislature made no such appropriation and the previous appropriations for such purposes have been exhausted. The appropriation for the railroad commission has in it no item for this purpose and your current expense budget contains no allotment for it. Therefore, you ask whether the funds in the aforesaid "Fees and Charges" item may be so employed.

In answering your question it will be assumed that the funds in the "Fees and Charges" item have been deposited in the state treasury as provided by Chapter 22833, Laws of Florida, Acts of 1945.

Regarding the fees paid to the railroad commission under (1) above, an examination of the statutes of this state reveals that there is no appropriation made by law authorizing the railroad commission to use such fees for any purpose.

The fees charged under (2) above are pursuant to Section 323.22, Florida Statutes, 1941, as amended by Chapter 22674, Laws of Florida, 1945, which provides that such fees shall be paid into the state treasury to the credit of the railroad commission fund. However, the last mentioned chapter fails to designate the purpose for which such fees can be used and I have been unable to find any other statute specifying the purpose for which they can be used.

The fees required of applicants under (3) above are paid pursuant to Sections 323.03 and 323.04, Florida Statutes, 1941, and under such sections are to be placed in the general fund of the railroad commission and applied to the cost of notices and hearings and for the administration of the provisions of Chapter 323 relating to auto transportation companies. It appears, then, that the use of such fees is limited to such purposes.

In view of the foregoing, it would seem that none of the fees contained in the "Fees and Charges" item of your current expense budget can be lawfully utilized by the railroad commission in payment for the aforesaid services to be rendered by special counsel.

It is my understanding that such special counsel has consented to accept the sum of \$1000.00 in payment for his employment from which he has agreed to pay for the services of four freight rate experts whose technical advice and services are necessary in the preparation of the answer and supporting brief; and that such technical advice and services were utilized by him heretofore in connection with the proceeding under discussion.

In this connection your attention is directed to Section 12 of Chapter 22827, Laws of Florida, Acts of 1945. Biennial Appropriation, by which there is appropriated the sum of \$500,000.00 for the purpose of supplying immediate funds for any unforeseen emergency that may arise and for the purpose of supplying additional funds to any state commission if the appropriation otherwise made by such chapter is found to be insufficient to pay the necessary costs of proper administration of the duties assigned. Such Section 12 provides that the sum thereby appropriated is under the complete supervision of the State Budget Commission and authorizes such commission by a majority vote, whether all members are present or not, in its discretion to designate any part of such sum for paying necessary expenses as aforesaid, provided application is made to such commission in writing, giving a complete statement of the funds needed and after public hearing and ample evidence of needs.

I do not know what part of the aforesaid sum of \$1000.00 is to be paid to the four freight rate experts but it appears that the State Budget Commission can, in the exercise of its discretion, designate from the sum appropriated by the aforesaid Section 12 a sufficient amount to pay such experts, provided the conditions precedent specified by such section have been met. However, it should be stated that such section specifically provides that no part of the appropriation thereunder shall be used for attorneys' fees. In view of the inhibition on attorneys' fees, it seems that you must look elsewhere for funds to pay to the special counsel that part of the \$1000.00 which he is to receive for his services.

I have been informed orally that arrangements will be made to pay from other funds the costs of printing the aforesaid answer and brief and that an opinion on this point is not now desired.

SPECIAL POWERS OF RAILROAD AND CANAL COMPANIES—TOLLS

April 22, 1946.—046-166.

SCHOOL LANDS—RAILROAD RIGHT OF WAY

QUESTION: Does Section 360.04, Florida Statutes, 1941, enable a railroad to obtain title to the land therein described, or is it limited to the right to take, occupy, hold and possess?

To Honorable Colin English, Secretary, State Board of Education of Florida:

This matter comes about through the application of the Atlantic Coast Line Railroad Company (1) to obtain title under Section 360.04, and (2) to obtain such title without compensation, to certain lands owned by the State Board of Education, together with other lands, for the purpose of acquiring a right-of-way for said railroad.

Section 360.04 is as follows:

"Every railroad . . . which shall . . . hereafter locate and construct its road . . . through any . . . school lands . . . owned and held by this state shall have the right to take, occupy, hold and possess for the purposes of a railroad . . . a strip of land two hundred feet wide through or across each and every tract of land so owned or held by the state, or over which said railroad . . . shall be constructed."

There is no mention in Section 360.04 of title passing and an examination of other sections of our law does not indicate to me that the legislature intended title to pass. It seems to me that the most that the railroad can obtain under Section 360.04 is the "right to take, occupy, hold and possess."

As to the question of whether or not such school lands may be acquired by the railroad without consideration, should the railroad apply to purchase the same, I do not believe this is possible in view of Article XII, Section 4, of the constitution, which declares that the proceeds of all lands granted to the state for public school purposes shall become a part of the State School Fund, and of Article XII, Section 5, which states that the principal of the State School Fund shall remain sacred and inviolate.

It is my opinion that if the railroad wishes to acquire a right-of-way across the school lands they may acquire it under Section 360.04, wherein no title is passed, or they may purchase the right-of-way from the State Board of Education "upon satisfactory terms," (270.09).

July 25, 1945.—045-204.

BONDS—WHEN REQUIRED OF BOARD MEMBERS

QUESTION: What bonds are required to be furnished by members appointed by the governor to the board of directors of "The Ship Canal Authority of the State of Florida," before being commissioned, under the provisions of Section 15, Chapter 16176, Acts of 1933, and Section 4 of Chapter 17023, Acts of 1935?

To Honorable R. A. Gray, Secretary of State:

Chapter 16176, Acts of 1933, created as a corporation "The Ship Canal Authority of the State of Florida." Broad powers are granted the corporation by the act (not necessary here to be detailed), having for their purpose the acquiring, owning, constructing, operating and maintaining a ship canal across the peninsula of the state connecting the Atlantic Ocean and Gulf of Mexico. Full power is given the governing body of the corporation to issue revenue bonds to acquire funds to accomplish

the aforesaid purposes, the act providing that the cost of acquiring, owning, constructing, operating and maintaining said canal and canal system, and expense of the corporation, should be paid entirely out of the income and revenues to be derived from the operation of said canal, or sale or lease of property belonging to the corporation, or from funds procured from loans to the corporation. Section 3 of the act provides for a board of directors, consisting of five members, to be appointed by the governor and to hold office for four years or until their successors are appointed, to manage the corporation. Section 15 requires each of such members to give bond in the sum of \$25,000, conditioned as therein set forth, and further provides: "It shall not be necessary for such bonds to be furnished, however, until the corporation shall have obtained a loan of sufficient moneys with which to construct said canal."

Chapter 17023, Acts of 1935, created and incorporated a special taxing district comprised of Duval, Clay, Putnam, Marion, Levy and Citrus counties, Florida, to be known as "The Florida Ship Canal Navigation District," for the purpose of raising funds to be used by "The Ship Canal Authority of the State of Florida" in paying for cost of securing a right of way for a ship canal across the state running through or adjacent to the aforesaid counties. Section 2 of said act provides a governing body for said district consisting of five members to be known and designated as the "Board of Commissioners of The Florida Ship Canal Navigation District"; and further provides that members of the board of directors of The Ship Canal Authority of the State of Florida, and their successors in office, shall be ex officio members of said district board of commissioners. Section 4 of said act provides that each member of said district board, before assuming to act as such, shall be required to give a good and sufficient surety bond in the sum of \$10,000, conditioned upon the faithful performance of his duties as a member of said district board and as a member of said board of directors.

Attention is directed to the above quoted provision of Section 15, Chapter 16176 to the effect that \$25,000 bond therein provided is not required to be furnished until the corporation shall have obtained a loan of sufficient money with which to construct said canal. It is assumed that no such loan has been obtained; and for this reason no attempt is here made to discuss the effect of Chapter 17023 with respect to Chapter 16176, beyond the extent herein set forth. It would seem that Chapter 17023 added to the powers and duties of the board of directors of the ship canal authority theretofore granted by Chapter 16176; and that the appointment by the governor of members of such board of directors in effect constitutes appointment of such members also as members of the board of commissioners of said district. It would, therefore, appear appropriate that as a prerequisite to the issuance of commissions to the members of said board of directors, the bonds required by Section 4 of Chapter 17023 should be furnished.

In view of the foregoing, in my opinion the above question is properly answered as follows:

In the absence of the ship canal authority of the State of Florida having obtained a loan of sufficient moneys with which to construct said canal, it would appear that the members of the board of directors of said Ship Canal Authority are each required to furnish only the \$10,000 bond payable and conditioned as set forth in Section 4, Chapter 17023, Acts of 1935.

CHAPTER XXII

CONSERVATION, ARCHEOLOGY AND GEOLOGY

FISH AND GAME, GENERALLY

June 17, 1946.—046-261.

DYNAMITING FISH—ARREST BY GAME WARDEN

QUESTIONS: 1. Is Section 371.09, Florida Statutes, 1941, prohibiting the throwing of dynamite into Florida waters to kill fish in force and effect, or is it superseded by said Rule 9.02 of the Wild Life Code?

2. Where a person is caught in the act of violating the laws relative to game and fresh water fish by a conservation officer, commonly called a game warden, working for the Game and Fresh Water Fish Commission, and such offense is bailable, can the person so arrested by the State officer compel that officer to allow him to bail, of the proper amount, on the spot where arrested?

To Honorable J. M. Hearn, County Judge, Suwannee County, Live Oak, Florida:

1. Section 371.09, Florida Statutes, 1941, prohibits the throwing or causing to be thrown into the waters of the State of Florida any dynamite for the purpose of killing the fish therein. Punishment is a fine not exceeding six hundred dollars or imprisonment not exceeding one year. The circuit court of your county has jurisdiction of this crime.

Rule 9.02 of the Wild Life Code, State of Florida, prohibits the throwing or placing of dynamite or other explosives into the fresh waters of the State of Florida whereby fish therein are or may be injured. The punishment for violation of this rule is a misdemeanor (Section 372.83, Florida Statutes, 1941). The county judge's court of your county has jurisdiction of such a violation.

The said code was promulgated under and by virtue of Section 30, Article IV of the Constitution of Florida.

Bell vs. Vaughn, 21 So. 2d. 31, 32, says:

"Since the purpose of Section 30, Article Four was to vest the 'management, restoration, conservation and regulation' of fresh water fish in the Game and Fresh Water Fish Commission, it would seem to necessarily follow that the purpose of the quoted part of paragraph four was to clothe the Game and Fresh Water Fish Commission with exclusive power to fix bag limits, open and closed seasons, and the 'method of taking' fresh water fish from Florida waters. Paragraph Seven of Section 30 expressly repeals all laws in conflict with Article Four and authorizes the Legislature to enact laws in aid of but not in conflict therewith."

In view of this decision of our supreme court, it is my opinion that Section 9.02 of the Wild Life Code insofar as freshwater is concerned repeals Section 371.09, Florida Statutes, 1941. Therefore, if dynamite was thrown into the fresh waters of the State of Florida, the offenders must be punished for violating the regulation set forth in Section 9.02 of the Wild Life Code, which is a misdemeanor, and over which the county judge's court of your county has jurisdiction.

Section 372.07, Florida Statutes, 1941, sets forth the police powers of the Game and Fresh Water Fish Commission and its agents. The law does not give the commission or its agents the authority to accept bail.

Sections 901.06 and 901.23, Florida Statutes, 1941, set forth the duties of an officer making the arrest. They require the said officer to take the person arrested before a magistrate. It is the duty of the magistrate to admit him to bail (Section 902.14, Florida Statutes, 1941). Therefore, in my opinion, this question should be answered in the negative.

April 29, 1946.—046-182.

OYSTER LEASE—DURATION

QUESTION: A person in 1903 enters into a lease for a term of 99 years with the board of county commissioners of Hillsborough county for the exclusive right to plant, cultivate and propagate oysters on certain submerged lands with the said county, the lessee to pay therefor an annual rental of \$10.00 per annum; the submerged lands are and have been for many years unfit by reason of pollution by sewage and other factors for the purpose for which the lease was made and entered into and for the further reason that the lessee has defaulted in the payment of the rentals. The lease, however, did not provide for termination upon default in payment of rent.

May the proper constituted authority regard the lease as of no force nor effect and make such disposition of the lands in question as may be authorized by law?

To Honorable Nathan Mayo, Commissioner of Agriculture:

Your attention is invited to (1) Section 371.03, Florida Statutes, 1941, which provides "All grants prior to June 1, 1913, made in pursuance of heretofore existing laws, where the person receiving such grant, his heirs or assigns, have bona fide complied with the requirement of said law, are hereby confirmed; * * *" and (2) the ruling in the case of *Gibson v. City of Tampa*, 185 So. 319, which involved a lease of similar terms and import as the one in question. In that case the lessee sought to enjoin the City of Tampa from discharging its sewage into the bay because such discharge was destroying the oyster beds of the lessee. The supreme court denied the injunction but held the city may be liable in damages, saying "The leases were alleged to be of long standing and, if this be true, they cannot be appropriated by the city without appropriate compensation any more than it can appropriate lands for streets or other purposes without compensation."

My answer to your question is that you have no authority to disregard the rights of the lessee under such a lease because by virtue of the lease an interest in the lands has been conveyed which may not be taken away except by due process of law and default in the payment of rent would not in and of itself terminate the leasehold interests. However, you undoubtedly can maintain an action to enforce payment of the rent due and in default thereof to secure termination of the lease.

GAME AND FRESH WATER FISH

August 14, 1945.—045-240.

PRIVATE GAME REFUGE—EXEMPTION FROM TAXATION

QUESTIONS: 1. Are lands owned and operated by a private corporation as a game refuge exempt from taxation under the laws of Florida?

2. May lands owned and operated by a private corporation as a game refuge be declared by the Game and Fresh Water Fish Commission to be a state game refuge for the purpose of invoking the laws against trespass?

To Honorable Millard F. Caldwell, Governor:

With respect to the first question, Section 372.19, Florida Statutes, 1941, provides:

"No property acquired by purchase, lease, gift, contract to purchase or lease, or otherwise, under the provisions of this chapter, as state game lands, or any private lands used as game refuges, shooting grounds, privileges, hatcheries or breeding ground for fish, game, birds, or fur-bearing animals, except state owned lands being used for the protection of game, fish or fur-bearing animals under the provisions of this chapter, shall be exempt from state, county or district taxation. Any contract, lease, gift or purchase of land for such purposes which attempts to exempt or partially exempt such property from taxation shall be null and void and of no effect."

The first question is therefore answered in the negative.

With regard to the second question, I find nothing in the statutory law which would authorize the Game and Fresh Water Fish Commission to designate any game refuge as a state game refuge, for the purpose of protecting the same against trespass under Section 372.11 except such refuges as are established by the state through the action of the commission. In my opinion, privately owned and operated game refuges may be protected against entry or trespass by the general statutes of the State prohibiting trespass upon private lands.

The second question is accordingly answered in the negative.

October 18, 1946.—046-436.

LOCAL LAWS—CONFLICT—REPEAL

QUESTION: Is Section 8065, Compiled General Laws of Florida now invalid, under Chapter 17928, Laws of Florida, 1937, and Chapter 20045, Special Acts of 1939?

To Honorable J. T. Hurst, Supervisor, State Board of Conservation:

Section 8065, Compiled General Laws of Florida, is not contained in the Florida Statutes, 1941, because said section is of local application. I do not find where Section 8065, *supra*, has been repealed either expressly or by implication. There is no conflict between this section and the two chapters cited by you. Chapter 17928, *supra*, prohibits fishing with seines, gill nets or other nets except a common hand cast net and/or bait net not to exceed thirty feet in length and four feet in depth, in Lake Worth or Little Lake Worth; in all counties of the State of Florida having not less than 51,000 nor more than 56,000 population according to the 1935 state census; and Chapter 20045, Laws of Florida, Special Acts of 1939, prohibits the taking of fish in the Loxahatchee river, also known as Jupiter river and Indian river, in Palm Beach county, Florida, by seines, gill nets, stop nets or any other kind of nets, excepting only cast nets having a length of less than six feet and a spread of less than twelve feet.

As to your other question "Do county laws precede general laws?", I do not understand your question. If you have in mind the apparent conflict between a special act and a general act, I suggest you set them forth so that I may better confine the answer to the particular question.

May 11, 1945.—045-109.

COMMISSION—POWER TO CHANGE METHOD OF ISSUING FISHING LICENSES

QUESTION: Does the Game and Fresh Water Fish Commission have the power to change the method of issuing fishing licenses so that all such licenses will date from July 1 through June 30 of the succeeding year?

To Dr. I. N. Kennedy, Director, Game and Fresh Water Fish Commission:

I have examined Section 30, Article IV of the Constitution of the State of Florida establishing the Game and Fresh Water Fish Commission and defining its powers and duties, as well as the laws of this state pertaining to the issuance of fishing licenses. Based upon such examination it is my opinion that such commission has no authority to make the change specified in your question and, therefore, the question must be answered in the negative.

December 11, 1946.—046-501.

MILEAGE—CONSERVATION OFFICERS

QUESTION: Frank Turner, a conservation officer, arrested three hunters about thirty-five miles south of LaBelle, for hunting with unplugged guns. He accepted \$25.00 cash bond from each. After plugging guns the three men continued their hunting. Mr. Turner went on checking hunting licenses. Two days later he turned the cash bonds over to me, stating that his mileage expense in each case was \$15.00. Is he entitled to mileage on each case in this instance?

To Honorable R. M. Harris, County Judge, Hendry County, LaBelle, Florida:

Section 372.72, Florida Statutes, 1941, says:

"... The Commission of Game and Fresh Water Fish and its conservation officers shall be allowed for making arrests the same fees as sheriffs, and the same mileage for conveying prisoners, the same to be taxed as costs in the cause in case of conviction and paid in like manner as the compensation of sheriffs but no fees or mileage shall be allowed in case of acquittal."

In my opinion, the conservation officer should not be entitled to mileage because (1) there has been no conviction and (2) if there had been a conviction, the officer did not convey the prisoners.

BOARD OF CONSERVATION

September 10, 1946.—046-378.

LEASED BOATS—SHRIMP AND PRAWN TAKING

QUESTION: May a bona fide resident of this state operate leased boats, not registered in this state, to engage in the business of shrimping?

To Honorable J. T. Hurst, Supervisor, State Board of Conservation:

I refer you to my opinion of June 17 concerning the interpretation of Chapter 22786, *supra*. My reasons for so holding in that opinion are applicable to my holding that a bona fide resident of this state for the required period of time may operate boats under lease, not registered in this state, to engage in the business of shrimping, provided the lease has been bona fide entered into and not for the purpose of circumventing the provisions of the law. I suggest that you require satisfactory proof that this lease is a bona fide one and not a subterfuge so as to allow nonresidents to operate their boats in the territorial waters of this state in the shrimping business.

June 17, 1946.—046-258.

DOMESTIC CORPORATION—SHRIMP AND PRAWN TAKING

QUESTIONS: 1. Does Chapter 22786, Laws of Florida, 1945, prohibit a domestic corporation having less than 12 months corporate existence from engaging in the taking of shrimp and prawn from the waters of this state?

2. Does said chapter prohibit such a corporation from using, in the taking of shrimp and prawn, a boat that has been newly constructed in this state, owned by said corporation and registered in this state but not registered for the specified period of "more than 12 months immediately past?"

To Honorable J. T. Hurst, Supervisor, State Board of Conservation:

It is necessary to go beyond the literal interpretation of the language used in said chapter to ascertain the intent of the legislature. Section 373.07, Florida Statutes, 1941, authorizes the State Board of Conservation to enter into reciprocal agreements with the proper authorities of other states whereby the residents of such states are permitted to take shrimp and prawn from the waters of this state provided Florida residents are accorded a similar privilege. It appears, therefore, that the legislature intended by Chapter 22786 to enact a law pertaining to residents of those states with which the State of Florida had no reciprocal agreement and to prevent the use of boats by such persons by requiring that the boats be registered in this state for a specified period of time; apparently trying to prevent any subterfuge of having boats registered in the names of residents so as to operate the boats for the shrimping season.

Chapter 22786 aforesaid in defining nonresident corporations to be any corporation not having had a bona fide place of business for a period of more than 12 months immediately past was surely intended to only apply to foreign corporations licensed to do business in this state and the definition of nonresident boat certainly was never intended to prohibit the use of newly constructed boats in this state by residents or domestic corporations or an association of residents upon the sole ground that they did not have a bona fide place of business for more than the immediate past 12 months.

I concede that my opinion is not in keeping with the strict letter of the statute but our supreme court has ruled:

"The intention of the legislature in enacting a law is the law itself and must be enforced when ascertained, although it may not be consistent with the strict letter of the statute. The court will not follow the letter of the statute when it leads away from the true intent and purposes of the legislature and to conclusions inconsistent with the general purpose of the act." Volume 12, Encyclopedic Digest of Florida Reports, citing *Curry v. Lehman*, 55 Fla. 847, 47 So. 18; *State v. Johnson*, 71 Fla. 363, 72 So. 477; *Payne v. Payne*, 82 Fla. 219, 89 So. 538; *Knight, etc., Co. v. Tampa Sand Lime Brick Co.*, 55 Fla. 728, 46 So. 285; *State v. Miami*, 101 Fla. 292, 134 So. 608,

and

"When the context of a statute, taken literally, conflicts with a plain legislative intent clearly appearing, the context must yield, otherwise the legislative purpose would be defeated." *West Palm Beach v. Amos*, 100 Fla. 891, 130 So. 710.

My answer to both your questions is negative.

December 1, 1945.—045-372.

CLOSED SEASON FOR MULLET—AUTHORITY TO OPEN

QUESTION: Does the State Board of Conservation under the present conservation laws of this state, have authority to open the closed season on mullet?

To Honorable J. T. Hurst, Supervisor, State Board of Conservation:

This office has held that the State Board of Conservation does not have power to extend or change an open or closed season, as fixed by the

legislature, except in connection with the war effort of the United States during an emergency. (See 1943-1944 Biennial Report, pages 333, 338 and 339; 1941-1942 Biennial Report, pages 505 and 508; 1935-1936 Biennial Report, page 649 and 1937-1938 Biennial Report, page 282).

The above opinions appear to be decisive of the above-stated question and hold that the State Board of Conservation under the present conservation laws of this state have no authority to open the closed season on mullet at the present time.

November 26, 1945.—045-367.

OIL WELL—PERMIT AND FEE FOR TEST

QUESTION: Is it necessary for a person desiring to drill a test well for geological information to get a permit from the conservation board and pay a fee of \$50.00 for such permit?

To Honorable R. A. Gray, Secretary, State Board of Conservation:

Section 18 of Chapter 22819, Laws of 1945, reads as follows:

"Before any well in search of oil or gas shall be drilled, the person desiring to drill the same shall notify the board upon such form as it may prescribe and shall pay a fee of fifty dollars for each well. The drilling of any well is hereby prohibited until such notice is given and such fee has been paid and permit granted."

It is true that the drilling of such a test well is not directly in search of oil and gas, but, of course, the purpose is to secure a test of land for oil and gas purposes.

In my opinion, therefore, the said section is broad enough to cover a test well for geological information and a permit is required and the fee of \$50.00 must be paid.

August 24, 1945.—045-260.

LINES OF DEMARCATION; FRESH AND SALT WATER

QUESTIONS: 1 Is Chapter 15416, Special Acts of 1931, still in effect?

2. If Chapter 15416, above, is still in effect, what is the meaning of the words, "A point where such inlet or pass empties into the Atlantic Ocean" as used in such chapter?

To Honorable J. T. Hurst, Supervisor, State Board of Conservation:

1. Our legislature has passed no act specifically repealing the chapter in question but I believe it appropriate to direct your attention to the following: Section 1 of this chapter makes it unlawful for any person, firm or corporation to place or set any seines, gill nets, or other nets, except a common cast net, in those waters of Palm Beach county described therein. I am not advised as to whether any of such waters are fresh or as to whether any of such waters are inhabited by fresh water fish but in either event it is possible that Section 30, Article IV of the Constitution of the State of Florida, creating the Game and Fresh Water Fish Commission and vesting that commission with the power to "regulate the manner and method of taking" fresh water fish, has operated to diminish to some extent the scope of such chapter. However, in the absence of facts showing the nature of the waters covered by such chapter and the fish inhabiting them, any further discussion of this possibility would be entirely conjectural so I do not undertake to pass upon it here.

2. The waters described in Section 1 of the aforesaid chapter are those "of any pass or inlet or in the Atlantic Ocean, in Palm Beach coun-

ty, . . . within a radius of three hundred yards of a point where such pass or inlet empties into the Atlantic Ocean," and you desire an opinion as to the meaning of the words which I have emphasized.

The chapter contains no provision as to what is to be considered the point at which such a pass or inlet empties into the Atlantic. It leaves to speculation, and subject to argument, many factors that could enter into the establishment of "a point" from which to extend the radius in measuring to determine the inhibited area. For instance, should the point be located where the pass or inlet empties into the Atlantic at high tide or should it be fixed where the pass or inlet so empties at low tide? The meaning of the words is clothed in uncertainty and a search of the decisions of our supreme court, as well as reference and textbooks, has disclosed nothing helpful in interpreting them. The chapter is a penal statute and must be strictly construed and any doubt or ambiguity would have to be resolved in favor of a person charged with its violation.

In view of the foregoing, I feel that such words are too vague and obscure for me to undertake to give them a specific meaning.

July 7, 1945.—045-174.

LICENSES FOR FISHING VESSELS ON LAKE OKEECHOBEE

QUESTION: Has the State Board of Conservation authority to require a fisherman to obtain a salt water boat license for a boat being used for net fishing in Lake Okeechobee, if such fisherman also pays for a fresh water boat license to fish in that lake?

To Honorable J. T. Hurst, Supervisor, State Board of Conservation:

Section 373.10, Florida Statutes, 1941, provides that

"(1) No boat . . . that plies or operates in the tidal or salt water of this state, may engage, in any way, in fishing, transporting fishermen or fishing parties, or otherwise have anything to do with salt water fishing, seafoods or other products of the salt water of this state, until a license therefor shall have been procured from the supervisor of conservation . . ."

It is provided by Section 374.20 of the aforesaid statutes as follows:

"For the purpose of this section Lake Okeechobee shall be considered salt water and fish, except black bass, may be taken at any time and used by residents and non-residents, subject to the restrictions and reservation imposed by law . . ."

This section also contains provisions making it unlawful for any person to have in his possession, or to fish, or to cause to be fished in the waters of such lake nets other than as described therein.

Section 374.21 as amended by Section 1 of Chapter 22788, Laws of Florida, Acts of 1945, indicates the intention of the legislature to declare as its policy and finding that the lake under discussion is salt water and subject to the laws of Florida relating to salt water fishing.

So long as the aforesaid statutes stand, Lake Okeechobee is salt water under the laws of this state and it is my opinion that the State Board of Conservation can require a fisherman, such as that one referred to in your question, to secure a salt water boat license for a boat being used therein for net fishing.

January 25, 1946.—046-23.

REVOCATION OF LICENSE IMPROPERLY ISSUED

QUESTIONS: 1. Can the State Board of Conservation of the State of Florida revoke a license issued by the supervisor of conservation of the

State of Florida under Section 373.10, Florida Statutes, 1941, to operate a vessel in the waters of Florida as a "Shrimp Boat" if such vessel is registered in the state of Louisiana?

2. In the event the answer to Question No. 1 is in the affirmative, what procedure should be followed in revoking the license?

To Honorable J. T. Hurst, Supervisor, State Board of Conservation:

Question No. 1: It appears from your letter, copies of application for the license, the license and from the information furnished by you orally that on October 18, 1945 the Florida resident owner of the boat in question made application to the State Board of Conservation of the State of Florida for a license under the above mentioned Section 373.10 and showed on such application that the license was desired to operate a boat within the salt waters of Florida and that the boat would be used principally as a "Shrimp Boat"; that on the last mentioned date the boat was, and presently is, registered in the state of Louisiana and there is no reciprocal agreement between that state and the State of Florida as provided by Section 373.07, Florida Statutes, 1941; that the license tax was paid on October 24, 1945 the license clerk in the office of the supervisor of conservation of the State of Florida, the administrative head of the State Board of Conservation, not knowing that the boat was registered in Louisiana, issued a license which showed on its face that the same was for the operation of a boat in the tide or salt waters of Florida as a "Shrimp Boat"; that since the issuance of such license the boat has been used in Florida waters for the purpose of taking shrimp.

Section 1 of Chapter 22786, General Laws of Florida, 1945, which became effective on May 31, 1945, amends Section 374.14, Florida Statutes, 1941, by providing in part that unless provision has been made therefor by a reciprocal agreement entered into according to the provision of the aforesaid Section 373.07, it shall be unlawful "for any non-resident boat to be used for the purpose of taking or catching or assisting in taking or catching, any shrimp * * * in or from the waters within the jurisdiction of this state, * * *", and defining a "non-resident boat" to be, among other things, "any boat or vessel which is registered in any other state, * * *". Respecting the licensing of a vessel that plies the tidal or salt waters of Florida, it is provided by Section 373.10 that "Upon proper application the supervisor of conservation shall register such vessel and issue a proper license therefor upon the payment of the * * * license tax, * * *".

The application, when considered with the fact that the boat was registered in Louisiana, reveals information indicating that the boat was to be used for a purpose violative of Chapter 22786 and the license, when viewed in the light of such fact, in effect is an official sanction for the boat to be so used. Obviously, no owner of a boat could be licensed legally by a board of the government of the State of Florida to operate a vessel for a purpose made unlawful by such chapter so long as the chapter is in operation. In the circumstances, neither the application nor the license was "proper" and, as you recognize, the license should not have been issued in the first place. It is my opinion, therefore, that the license is subject to revocation.

Question No. 2: We have no statute concerning the revocation of a license issued as aforesaid and, consequently, no statutory provision has been made as to the manner in which such revocation should be accomplished. It is my suggestion: (1) that the Supervisor of Conservation should produce before the State Board of Conservation for its examination the evidence disclosing, and reflecting the accuracy of, the information set forth in the first paragraph under Question No. 1 in order that such board may decide whether it desires to institute revocation proceedings; (2) that if such board decides that such proceedings should be instituted, the board should hold a hearing at a later date to make a final determination on the question of revocation; (3) that notice should be given by

such board to the owner of the vessel delineating the reasons for which revocation of the license is contemplated, advising him that such license will be revoked for such reasons unless he shows cause at such hearing, if any he can, why the license should not be revoked and informing him of the time and place of the hearing; (4) that such notice should be delivered, and its contents made known, to such owner not less than one week prior to the date of the hearing; (5) that at the time and place specified in the notice the board should receive and hear the evidence for and against revocation of the license; (6) that based upon such evidence, the board should determine whether or not the license should be revoked and enter its order accordingly; (7) that the owner should be furnished with a copy of such order and (8) that if the decision of the board is for revocation, the license tax should be returned to the owner and a copy of the order should be delivered, and its contents made known, to him.

This office will be glad to render such assistance as may be necessary in implementing the foregoing suggestions if the board determines that revocation proceedings are to be undertaken.

SALT WATER FISHERIES

October 7, 1946.—046-417.

CANNERY—LIABILITY FOR LICENSE

QUESTION: Is one operating a cannery canning sea turtle or crab meat required to have a wholesale dealers's license?

To Honorable J. T. Hurst, Supervisor, State Board of Conservation:

A wholesale seafood dealer is defined to be:

"Any person, firm or corporation * * * dealing in fish, seafoods or salt water products of any kind * * * who sells any such products to wholesale dealers, retail dealers or to hotels, restaurants or public eating places." Section 374.31, Florida Statutes, 1941.

If by the term "operating" you mean the process of canning and sale of the canned products to a wholesaler, retailer or to a hotel, restaurant or public eating place, my answer to your question is in the affirmative. If by the term "operating" you mean nothing more than the process of "canning," there is no license required.

May 24, 1945.—045-123.

SEAFOOD DEALERS—LICENSES

QUESTION: Does the State Board of Conservation have authority to collect a separate wholesale seafood dealer's license on each truck from which salt water fish and seafoods are sold?

To Honorable J. T. Hurst, Supervisor, State Board of Conservation:

Section 374.30, Florida Statutes, 1941, requires "seafood dealers" to procure a license as a condition precedent to doing business or fishing in Florida and specifies the amount to be paid for such license by "wholesale seafood dealers." A "wholesale seafood dealer" is defined by Section 374.31 as "any person, firm or corporation, or any co-operative association" engaged in certain designated activities and the only reference to trucks is contained in the concluding sentence of such definition, which is as follows: "Dealers carrying on such business with trucks, automobiles, or other vehicles, and not having an established place of business, shall be considered wholesale seafood dealers." In this connection it is noted

also that in Section 374.33, which relates to the revocation of seafood dealers' licenses, it is provided that such licenses "are good only to the person to whom issued and named therein."

It appears from the foregoing that the license tax is imposed on the dealer and not on the truck or trucks from which salt water fish and seafoods might be sold by the dealer; that the license tax should be collected from each wholesale seafood dealer as defined by Section 374.31, without regard to whether such dealer sells salt water fish and seafoods from one or more trucks. Consequently, it is my opinion that your question should be answered in the negative.

January 10, 1945.—045-2.

MULLET—FUNDS FROM SEIZURE AND SALE; DISPOSITION

QUESTION: What disposition should be made of \$1,100.00 realized through the seizure and sale by a conservation agent of a shipment of mullet which a wholesale seafood dealer was selling and transporting without all the invoices and containers of such mullet having thereon such dealer's permit number issued by the State Board of Conservation?

To Honorable J. T. Hurst, Supervisor, State Board of Conservation:

The sale and transportation of mullet in the circumstances outlined above was in violation of Section 374.32, Florida Statutes, 1941, which section further provides that the proceeds of a sale such as that made by the conservation agent "shall be paid into the state treasury to the credit of the conservation fund."

In the light of the foregoing, it is my opinion that the \$1,100.00 in question should be paid into the state treasury for the credit of the Conservation Fund in accordance with the quoted provision of the above mentioned section.

April 20, 1946.—046-161.

SHRIMP—LEGAL SIZE

QUESTION: Do the provisions of Chapter 21249, Laws of Florida, Special Acts of 1941, govern the legal size of shrimp to be taken in Franklin county, Florida, or do the provisions of Chapter 22786, Laws of Florida, Acts of 1945, control?

To Honorable J. T. Hurst, Supervisor, State Board of Conservation:

I invite your attention to the fact that Chapter 21249, supra, applies to the following locale: "in the counties of Franklin and Gulf or in or from the inside or outside waters of the counties of Franklin and Gulf."

Your attention is further invited to the fact that paragraph 4 of Section 1 of Chapter 22786, supra, makes it unlawful to take or catch shrimp from the waters described in subsection 2 of Section 2 of said chapter, which is Section 374.15, Florida Statutes, 1941, which describes waters on the East Coast of Florida, the south boundary line thereof being a line drawn from the center of the Fort Pierce Inlet at a point where it intersects the coast line and extends east three marine leagues into the Atlantic Ocean.

My answer to your question is that Chapter 21249, Laws of Florida, Special Acts of 1941, controls.

July 5, 1946.—046-291.

LICENSES—WHOLESALE DEALER—DEFINITION

QUESTION: Is a wholesale seafood dealer's license required of a firm who cleans, processes and cooks shrimp for shrimp cocktail which is frozen, and sold through distribution?

To Honorable J. T. Hurst, Supervisor, State Board of Conservation:

Section 374.31, Florida Statutes, 1941, defines a wholesale seafood dealer to be any person, firm or corporation dealing in fish, seafoods or salt water products of any kind, including oysters, clams and whelks, who sells any of such products to wholesale dealers, retail dealers or to hotels, restaurants, or other public eating places.

The term "distributor" connotes a wholesaler or jobber of goods and it may include a retailer (*Port Wine and Liquor Shop v. Miller Bros. Fruiterers*, 1 N. Y. S. (2) 802, 805.)

In my opinion a wholesale seafood dealer's license is required of such a firm.

SHELLFISH

June 18, 1946.—046-259.

OYSTERS—TAKING FROM LEASED LANDS

QUESTIONS: 1. Is there legal authority at present for the taking of seed oysters, in or out of season, from specifically designated areas—and only from any such areas, and what are the terms and conditions of any such procedure?

2. What is the authority, if any, of Dewey Miller, sub-lessee, or any other person to take, transport and ship oysters from so-called private beds—out of season?

To Honorable J. T. Hurst, Supervisor, State Board of Conservation:

It is unlawful to take, gather or catch oysters on the natural reefs of this state or have possession thereof for sale between April 15, and October 1. There are exceptions to this law and they are

(1) Private leased or granted grounds or artificial beds of riparian owners.

(2) The State Board of Conservation has authority to permit the taking of uncultured oysters from April 1 to October 1, for bedding purposes.

(3) Oysters may be taken at any time of the year for home consumption provided not more than one barrel in the shell or two gallons opened or shucked be taken in any one day. Section 375.15, Florida Statutes, 1941.

My answer to your first question answers your second question, provided the lessee in question has kept and performed the covenants on his part that are to be kept and performed under the conditions of his lease.

I do not understand that portion of your first question, to wit: "Terms and conditions of any such procedure." If you are referring to how a lease may be procured, your attention is invited to the provisions of Chapter 375, Florida Statutes, 1941.

August 20, 1945.—045-245.

OYSTERS—SEVERANCE TAX

QUESTION: Under Chapter 23132, Laws of Florida, 1945, is the severance tax on oysters, levied on a per barrel basis, two cents, five cents or eight cents per barrel?

To Honorable J. T. Hurst, Supervisor, State Board of Conservation:

Chapter 23132, supra, is an amendment of Section 375.20, Florida Statutes, 1941, and levies upon all oysters taxes thereby on a per barrel basis and gathered from natural, private or artificial reefs and bedding and propagating grounds in this state the following severance taxes:

1. Five cents per barrel on all oysters gathered for what is known as the raw stock trade;
2. Five cents per barrel on all oysters gathered for what is known as the can stock trade;
3. Two cents per barrel on all oysters that are gathered for sale but are not gathered for either the raw stock or can stock trade.

Your attention is respectfully directed also to the provision of such chapter whereby oysters taken from natural reefs for bedding purposes are not liable to the severance tax until taken up for sale.

CHAPTER XXIII

PUBLIC HEALTH

PUBLIC HEALTH, GENERALLY

November 1, 1946.—046-474.

IMPROVEMENT COMMISSION—HOSPITAL SURVEY AUTHORITY

QUESTIONS: 1. Do the statutes recited in the application to the Surgeon General, U. S. Public Health Service, for federal funds to assist the state in carrying out Section 601(a) of the Hospital Survey and Construction Act constitute the sole statutory authority for the making of a hospital inventory and survey and the development of a hospital construction program in Florida? If there are additional statutes which are pertinent; please indicate?

2. Was the executive action relied upon as a part of the legal basis for the application (in particular the executive order of August 28, 1946) promulgated pursuant to competent authority and in accordance with law?

3. Are the statements in the application legally correct? Please specify any particulars in which the statements in the application are not correct.

To Honorable C. H. Overman, Director, Florida State Improvement Commission:

The above questions are answered in their numbered order as follows:

1. This question is answered in the affirmative. It is pointed out that this authority is found in Chapter 22851, Laws of Florida, Acts of 1945, also identified as Chapter 380, Florida Statutes, 1941, as amended; and specifically the authority is found in Section 380.01, Florida Statutes, 1941, as amended. It is noted, further, that since, by the executive order of August 28, 1946 (see Document No. 2, attached to application), Florida State Improvement Commission was designated the state agency to function with respect to the matters contemplated by the application, this power to so function is, in my opinion, comprehended by the general powers granted the commission by Section 420.06 (7), Florida Statutes, 1941, as amended.

2. Section 380.01 (1), Florida Statutes, 1941, as amended, authorized the governor of Florida to designate a single state agency for carrying out the purposes contemplated by the application in so far as the state is concerned. The governor, by said executive order of August 28, 1946, designated Florida State Improvement Commission; and it is my opinion that said executive order, so designating such commission, was within the authority set forth in said law. Whether or not the authority thus conferred by this provision of law upon the governor of Florida constituted an unlawful delegation of the legislative power is a question which definitely could only be settled by our courts in appropriate proceedings; and until judicial approval from the Supreme Court of Florida for this delegation of power has been obtained, I cannot with any degree of confidence express any opinion concerning same.

3. This question is answered in the affirmative with the following qualifying statement respecting state funds available for the fiscal year ending June 30, 1947:

Under Sections 380.02 and 380.03, Florida Statutes, 1941, as amended, there are total appropriations of \$10,000 as set forth in paragraph 8 of the application.

Section 420.11, Florida Statutes, 1941, as amended, provides an annual appropriation of \$50,000 for Florida State Improvement Commission to carry out the purposes authorized by Chapter 420, Florida Statutes, 1941, as amended. As mentioned above, in my opinion, the functions of the commission contemplated by the application are comprehended by said Section 420.06(7) when read in conjunction with the provisions of Chapter 380, Florida Statutes, 1941, as amended; hence, it would seem that properly the commission may set aside out of its annual appropriation \$10,000, as set forth in paragraph 8 of the application. By Section 216.17, Florida Statutes, 1941, as amended, moneys appropriated to any spending agency of the state are available to such agency when and to the extent that the budget commission for the State of Florida, shall approve the use thereof, as in said section provided. The statement in said paragraph 8 of state funds available is here approved, subject to evidence being attached to the application showing release of such sums or approval of the use thereof, for the purpose aforesaid by the budget commission for the State of Florida.

In connection with my answers to the above questions, it is considered proper to call to your attention that the federal act for this program vests in the surgeon general wide regulatory powers within the purview of the act (see Section 622), and that acceptance of federal funds under the act renders the state agency and political subdivisions or others constructing hospitals as contemplated by the program, subservient to the provisions of the act and to such regulations as may properly be promulgated thereunder. Particular attention is directed to Section 622 (f) of the federal act, which would appear to contemplate the waiver of racial segregation as we observe it.

It is further observed that while this opinion finds that your agency properly may develop such a hospital construction program, I know of no authority for your agency to enter into the construction of any projects under such program.

STATE BOARD OF HEALTH

January 3, 1945.—045-5.

REGISTRATION OF A PERSON ENJOINED FROM PRACTICING MEDICINE

QUESTION: May the State Board of Health register a person as a licensed physician when said person has been perpetually enjoined from practicing medicine in this state by the Escambia county court of record?

To Honorable M. H. Doss, Director, State Bureau of Narcotics:

Since receipt of your letter I have obtained a copy of the perpetual injunction to which you refer and it recites that the court finds the person enjoined has been practicing medicine in the State of Florida without any license or authority whatsoever to do so and that such practice is a nuisance and injurious to the public health.

Said injunction restrains and enjoins said person from practicing medicine in the State of Florida.

It is my opinion that in view of this adjudication it is your duty not to register said person as a licensed physician of the State of Florida unless and until said injunction is set aside or reversed.

BUREAU OF VITAL STATISTICS

January 5, 1946.—046-3.

DELAYED BIRTH CERTIFICATES—COSTS

QUESTION: What is the maximum charge permitted county judges for issuance of delayed birth certificates?

To Honorable Millard F. Caldwell, Governor:

"382.46—The county judge for his complete service in establishing a delayed birth certificate and order under this law (Chapter 21931, Laws of 1943) shall receive the sum of \$2.00 * * *

"382.47—The bureau of vital statistics and the county judge are each authorized to make and furnish additional certified copies of such order upon payment of the sum of 50c therefor."

I know of no law allowing the county judge to charge costs greater than set forth in these two sections.

November 29, 1946.—046-487.

BIRTH CERTIFICATES—UNNATURALIZED PERSON

QUESTION: Does the word "resident" in the first line of Section 1, Chapter 22887, Acts of 1945, pertaining to birth certificates, apply to unnaturalized persons?

To Honorable William C. Brooker, County Judge, Hillsborough County, Tampa, Florida:

In my opinion, the statute applies to all persons residing in the state and, therefore, would apply to unnaturalized residents. Had the legislature intended to exclude unnaturalized persons it would have undoubtedly used the term "citizen" instead of "resident."

VENEREAL DISEASES

December 13, 1945.—045-388.

ISOLATION OF INMATES OF COUNTY JAILS

QUESTION: In an instance where, under the provisions of Chapter 384, Florida Statutes, 1941, as amended, an order with appropriate recitals has properly been issued by a state health officer, requiring that a person infected with venereal disease be isolated, quarantined and treated in the jail of the county where such person resides, is the sheriff of said county required to receive such person in said jail?

To Dr. Wilson T. Sowder, State Health Officer, Jacksonville, Florida:

On July 10, 1942, this office issued an opinion (our No. 042-349, Biennial Report of Attorney General, 1941-1942, page 31). You inform me that the sheriff in this instance refuses to accept such person ordered isolated upon the authority of that opinion. No purpose would be served distinguishing between the circumstances there involved and the instant factual situation. Under the law then obtaining, the opinion was correct. A copy of such opinion is hereto attached.

It will be helpful to consider another opinion of this office, one dated January 30, 1943 and addressed to the State Board of Health (our No. 043-35, Biennial Report of Attorney General, 1943-1944, page 349). While said Chapter 384 was amended by several acts of the 1943 legislature, it appears such opinion is still applicable to the circumstances and the procedure, if required, under which the health authorities may examine a person for venereal disease, here summarized as follows: (1) with such person's consent; (2) as result of warrant issued under Section 384.04; and (3) as an incident of imprisonment under Section 384.08.

Section 384.17, 1943 Supplement to Florida Statutes, 1941, (being Section 4 of Chapter 21948, Laws of Florida, Acts of 1943) provides, in effect, that if for any reason a person infected with a venereal disease cannot be received for treatment at a hospital operated by the State

Board of Health, then such person may be isolated and quarantined for treatment in the jail of the county or city where said person resides, at the expense of the county or city involved.

Section 384.18, 1943 Supplement to Florida Statutes, 1941 (being Section 5 of said Chapter 21948), provides that the sheriffs of the several counties shall receive the same fees and mileage for services rendered under this law, as are prescribed for like service in criminal cases, such fees and mileage to be paid out of the fine and forfeiture fund of the county involved.

Granted that the health authorities have properly ascertained, as contemplated by the provisions of said Chapter 384, that a person is infected with a venereal disease, a state health officer may commit such person for quarantine and compulsory treatment in a hospital within the state operated for that purpose by the State Board of Health, if in the judgment of such officer that action is necessary to protect the public health. Section 384.14, 1943 Supplement to Florida Statutes, 1941. Or, under such circumstances, said officer may, if such person cannot be received by any such hospital, commit said person, as aforesaid, to the county jail. Section 384.17, *supra*. An order of quarantine is all that is required to authorize such detention for treatment. Such order is not criminal process. *Varhaly vs. Sweat*, (Fla.) 15 So. 2d. 267.

In view of the foregoing, it appears the above question properly is answered as follows:

(1) Granted that the state health authorities have ascertained that a person is infected with venereal disease as provided in said Chapter 384, as amended, and under one or the other of the circumstances set forth and summarized above, a health officer of the state, as contemplated by said Section 384.17, may issue an order requiring that a person infected with venereal disease be isolated, quarantined and treated in the jail of the county where such person resides, such order to contain recitals to the effect that said action is necessary for the protection of the public health, and that such person cannot be received at a hospital operated by the State Board of Health for such treatment (and the reason why), and the sheriff of the county, under such circumstances, is required to accept from such health officer said person and to detain such person in the county jail for treatment in pursuance of said order.

(2) Since such person, under the circumstances set forth in the above question, is detained in the county jail for treatment at the expense of the county under said Section 384.18, it would appear the sheriff is entitled to the same fees for detaining and feeding him as are provided by law for such items in connection with a prisoner held under criminal process.

FLORIDA CRIPPLED CHILDREN'S COMMISSION

May 7, 1945.—045-105.

APPROPRIATION—AVAILABILITY TO COMMISSION

QUESTIONS: 1. Is the amount of \$50,000.00 as appropriated in Section 391.09, Florida Statutes, 1941, available to the Florida Crippled Children's Commission?

2. If this fund is available, can the commission draw on it for its expenditures after a request has been granted by the budget commission for release of the amount requested by the Florida Crippled Children's Commission?

To Dr. L. J. Graves, Acting Director of Services, Florida Crippled Children's Commission:

Section 391.09 is from the original act establishing the Florida Crippled Children's Commission and it provides an annual appropriation of \$50,000.00 for the purpose of carrying out the duties of the Florida Crippled Children's Commission. It was enacted as a continuing appropriation, but prior to every session of the legislature since its enactment in 1929, your commission has prepared and submitted a budget to the budget commission and the legislature has at every session made an appropriation for your commission based upon the budget. The amount appropriated has been increased from time to time by the legislature. In you budget for 1943-1944, you requested \$150,000.00 for all purposes and the legislature in the general appropriation bill appropriated that amount for all of the functions of your commission.

Section 1 of the General Appropriation Act of 1943 provides that the sums appropriated

"... are hereby appropriated as the amounts to be used to pay Salaries, Necessary and Regular Expenses, Special Expenses, and other Expenses for each department of the State of Florida as herein listed to be paid out of funds herein appropriated, for the annual periods beginning July 1, 1943 and July 1, 1944 . . ."

I have no doubt whatever that it was the intention of the legislature that your commission should have only the amount appropriated in the general appropriation bill and that such appropriation was in lieu of the amount provided in Section 391.09—not as an additional appropriation. Moreover, no other construction would be consistent with the budgets submitted by your commission from session to session requesting an appropriation for all purposes and granted by each legislature.

The general appropriations for your commission at each session have not repealed Section 391.09. The effect of each such general appropriation was merely to suspend that section for the biennium. It is my opinion that the \$50,000.00 mentioned in Section 391.09 is not available to your commission and that you are limited to the \$150,000.00 annual appropriation contained in the General Appropriation Act of 1943.

This negative answer to your first question makes it unnecessary to answer your second question.

TUBERCULOSIS SANATORIUM

January 26, 1945.—045-18.

STATE TUBERCULOSIS BOARD—EMPLOYEES' GROUP INSURANCE

QUESTION: Is it lawful for the State Tuberculosis Board to contribute a part of the premiums for group insurance of its employees?

To the State Tuberculosis Board, Jacksonville, Florida:

In two opinions to other state agencies, dated August 8, 1941 and February 13, 1942, I held that all such premiums must be paid from deductions from the employees' wages or salaries. I adhere to those holdings, and accordingly it is my opinion that your board has no authority to contribute any part of such premiums.

June 26, 1946.—046-285.

UNEXPENDED BALANCE—USE

QUESTION: Will the unexpended portion of the continuing appropriation to the State Tuberculosis Board for the operation of its sanatorium under Section 392.12 of the statutes revert at the end of the present fiscal year or will such unexpended balance carry over into the next fiscal year?

To the State Tuberculosis Board, Orlando, Florida:

Section 392.12 of the statutes reads as follows:

"The sum of three hundred thousand dollars, or as much thereof as may be necessary, is appropriated annually from the general revenue fund for the purpose of carrying out the provisions of this chapter."

Ordinarily such an appropriation would mean just what it says, that is, the appropriation would be not three hundred thousand dollars but only so much thereof as may be necessary. However, in 1941 the legislature enacted Chapter 20630, now appearing as Section 392.14 of the statutes, the first paragraph of which reads as follows:

"The state tuberculosis board is hereby authorized to use any sums of money which it may heretofore have saved or which it may hereafter save from its regular operating appropriation, or to use any sums of money acquired by gift or grant, or any sums of money it may acquire by the issuance of revenue certificates of the sanatorium to match or supplement any state or federal funds, or any moneys received by said board by gift or otherwise, for the construction and equipment of additional facilities as may be in the opinion of said board required or deemed necessary."

The preamble to that act contained the following recital:

"Whereas, by a careful and economical management, the State Tuberculosis Board and the Staff of the Sanatorium have accumulated and saved a surplus from its operating appropriation and the State Tuberculosis Board hopes to continue to make savings from its operating appropriations:"

Reading the whole chapter and particularly Section 392.14 which was added in 1941, it is clear that the legislative intent, at least since 1941, was to permit the carrying forward of any part of the annual maximum appropriation of three hundred thousand dollars which might not be expended in any one year, the same to be used for the purposes set out in Section 392.14. Accordingly, it is my opinion that the anticipated unexpended portion of the three hundred thousand dollar maximum operating appropriation for the current year should be carried over into the next year.

June 8, 1945.—045-140.

APPROPRIATION—USE FOR CONSTRUCTION

QUESTIONS: 1. What is the scope and flexibility of Senate Bill No. 366 (Chapter 22820, Acts of 1945)?

2. May a tuberculosis sanatorium or an addition thereto be constructed from funds provided for by said bill?

To Honorable Millard F. Caldwell, Governor:

In reply to your oral inquiry as to the above matter, I beg leave to state that I have examined the bill in question and also the available applicable law, and with the following result:

Senate Bill No. 366 in Section 1 thereof appropriates the sum of \$3,000,000.00 to be

a) Available to the Board of Commissioners of State Institutions; for

b) The purpose of providing in a manner deemed expedient such buildings and other facilities as said board may determine, and

c) The said board is thereby authorized to do and perform all acts and things necessary thereto.

d) Among buildings and other facilities to be provided shall be those thereafter listed.

e) There follows a list that does not include a tuberculosis sanatorium, nor an addition thereto.

The bill in Section 2 creates and provides for a state building fund out of unexpended balances of other funds, and provides for the sequestration of the fund and its use for the purposes outlined in the bill.

While the bill is specific as to certain matters that may be considered and dealt with, it is not exclusive, but the word "among" the buildings and other facilities is used indicating that the listing is not all-inclusive, and the grouping adopted, it is expressly provided, is not a creation of inflexible priority.

In the case of *Mayo, Comr. of Agriculture, v. Matthews*, 150 So. 900, the Supreme Court of Florida has approved the rule that the governor with the approval of the Board of Commissioners of State Institutions was authorized to acquire land in the name of the state for a site for a chemical laboratory, the purchase price to be paid from general inspection funds.

While the cited case is not identical in facts, its latitude would seem to include the present situation even more plainly than it applied to its own facts.

Under the terms and provisions of Section 392.14, Florida Statutes, 1941, the State Tuberculosis Board is authorized to use any money received by it from any source for the construction and equipment of additional facilities. The authority does not appear to be exclusive, or such as to prevent the board of commissioners, under Bill No. 366, using funds provided for by it for the same or a similar purpose.

From the foregoing it is my opinion that the governor with the acquiescence of the Board of Commissioners of State Institutions has the authority suggested, and that the question should be answered in the affirmative.

To obviate the necessity of further inquiry, I will state that it is to be understood as a part of this opinion that funds of either the original appropriation of \$3,000,000.00 or the accumulations of the state building fund may be used for the purpose of building the tuberculosis building, the matter of priorities having been expressly excluded from consideration by the language of Section 1 of the bill.

For the same reason I will state that it is my opinion that if the funds contemplated and provided for by this bill are used for this purpose, the details of construction should at all times be and remain under the supervision and control of the Board of Commissioners of State Institutions.

February 22, 1946.—046-64.

PROPERTY—ACCEPTANCE

QUESTION: Where it is the purpose to convey property to the State of Florida which is to be utilized in the treatment of tubercular patients, is that purpose properly effectuated through the conveyance of such property to the State Tuberculosis Board of Florida?

To Honorable Tourley Rankin, Attorney for the War Assets Corporation, Railroad Retirement Building, Washington, D. C.:

Chapter 392, Florida Statutes, 1941, as amended, creates the State Tuberculosis Board and defines its powers and duties. Section 392.02 thereof provides, in part, as follows:

"The State Tuberculosis Board shall be a body corporate * * *; shall have power * * * to receive donations and bequests; to make purchases of lands and tenements, and to contract for the sale and disposal of the same, but the title to all such donations, bequests and property, however acquired, shall be vested in the State Tuberculosis Board, and shall only be transferred and conveyed by it, and shall have and possess all of the powers of a body corporate for all the purposes created by or that may exist under the provisions of this Chapter, or any act or acts amendatory thereof."

By means of the foregoing statutes the legislature has created and designated the State Tuberculosis Board as the exclusive state agency through which the state may acquire sites for, establish and maintain sanatoriums for the treatment of tubercular patients, and the acquisition of property by that agency is tantamount to its acquisition by the state.

Support for these conclusions is found in the opinion of the Florida Supreme Court in the case of *Brash v. State Tuberculosis Board*, 167 So. (Fla.) 827, in which the court said:

"If, as proposed by gift and loan from the federal government, land is acquired by the State Tuberculosis Board, upon which to erect a State Tuberculosis Sanatorium, such land will become the property of the state * * *. The State Tuberculosis Board is a state agency composed of state officers having governmental corporate authority * * *. Property duly acquired by such board under the cited legislative enactments is state property."

Therefore, it is my opinion that the question should be answered in the affirmative.

October 30, 1946.—046-472.

PURCHASE OF TRUCKS—ALTERATION

QUESTION: May the purchase price of two pickup trucks for the State Tuberculosis Sanatorium, one for the Marianna branch and one for the Tampa branch, be paid from the state building fund as a part of the alteration and equipment program authorized for those two branches?

To Honorable Terry C. Lee, Budget Director:

Whether the purchase price, under the circumstances, could lawfully be paid from the building fund is at least doubtful and in view of what is said below it will not be necessary at this time to answer the question in the manner submitted.

In an opinion of August 28, 1941, No. 041-513, I held that the State Tuberculosis Board had authority to purchase trucks when they are necessary for the use of the sanatorium in carrying out its institutional purposes (as distinguished from the personal use of officers or employees of the agency) when sufficient funds were available in its appropriation for necessary and regular expenses.

It is my understanding that the State Tuberculosis Board does not have funds for the purchase of these trucks. In Section 12 of the General Appropriation Act of 1945, Section 282.22 Cum. Supp., the legislature made an emergency appropriation of \$500,000 "for the purpose of supplying immediate funds for any unforeseen emergency that may

arise and for the purpose of supplying additional funds to any state office, commission, department, board, bureau, institution or other agency of the State Government, if the appropriations made herein are found to be insufficient to pay the necessary cost of proper administration of the duties assigned."

These trucks would be a part of the operating expenses of the State Tuberculosis Board and the situation in this case appears to bring it within the quoted portion of the General Appropriation Act. Accordingly, it is my opinion that if the State Tuberculosis Board certifies, or otherwise satisfies the budget commission that these trucks are essential to the functioning of that board in conducting its statutory duties, funds from the emergency appropriation may be used for the purchase price thereof and the trucks used wherever the board may need them.

FARM COLONY FOR EPILEPTIC AND FEEBLE-MINDED

April 24, 1946.—046-170.

ADMITTANCE REQUIREMENTS—DOMICILE OF PARENT

QUESTION: A mother, now forty years old, came to Florida from New York state three years ago, married in Florida in January, 1945, and with her husband resides here. From the time she was three years old until the year 1942, except for three or four short periods, each less than one year, she was an inmate of a charitable or public institution of New York State, as a deaf and dumb and subnormal person. On several occasions she ran away from the institution where held. On two occasions, when paroled to an aunt, she ran away and when apprehended was in a pregnant condition. She had three illegitimate children, all born in a charitable or public institution, and two of them died in such an institution. One child, born in 1931, is feeble-minded, is now an inmate of a state institution in New York, and has been such an inmate, it is assumed, for a considerable part of her life. The mother has not seen this child since the latter was two years old. It is now desired by New York State authorities to effect transfer of the child to Florida Farm Colony, on the theory that the child's residence is fixed by that of the surviving parent. May this child now be accepted at Florida Farm Colony?

To Mr. R. C. Philips, Superintendent, Florida Farm Colony, Gainesville, Florida:

At the outset, it is noted that there is no explicit provision in Chapter 393, Florida Statutes, 1941 (dealing with Florida Farm Colony) analogous to Section 394.27, Florida Statutes, 1941, which provides that only a person who has been a bona fide resident of the State of Florida for one year immediately preceding the examination of said person may be committed to Florida State Hospital for treatment. However, it is obvious that the facilities of Florida Farm Colony are provided for residents of this state; and for the purposes of committing one to such institution, a county judge has jurisdiction only of a person who resides in his county. Section 393.11, Florida Statutes, 1941.

Subject to certain exceptions not necessary to mention here, the domicile of a legitimate child follows that of the father. *Minick vs. Minick*, 111 Fla. 469, 149 So. 483. Upon the death of the father, the infant's domicile, subject to certain exceptions, devolves upon the mother. *Johnson vs. Smith*, 94 Ind. App. 619, 180 N. E. 188; *Duke vs. Johnson*, 211 N. C. 171, 189 S. E. 504. An illegitimate infant's domicile or "residence" is governed by that of the mother, in the absence of desertion or abandonment. *Glansman vs. Ledbetter*, 190 Ind. 505, 130 N. E. 230; *Thayer vs. Thayer*, 187 N. C. 573, 122 S. E. 307; *Harlan vs. Industrial Accident Commission*, 194 Cal. 252, 228 P. 654. It would seem that by the consent of the parent controlling the domicile of a child, the domi-

file of a child under certain circumstances may be established separate and apart from such parent's. *Taylor vs. Jeter*, 33 Ga. 195, 81 Am. Dec. 202; *McDowell, et al. vs. Gould*, 166 Ga. 670, 144 S. E. 206.

This mother, it would seem, by specific act (desertion, abandonment or consent) could have surrendered her right to the custody of the child or to the control by her, in law, of the domicile of the child, granted such mother possessed the mental capacity to be held accountable for her acts or to contract. The melancholy history of this unfortunate mother and child, each subnormal and long residents of charitable or public institutions, their actual relationship so opposed to anything even approaching the normal relationship of mother and child, would seem to evidence such negation of any responsibility of the mother for the child as to constitute a relinquishment by the mother of control of the child as effectively as though that control had been surrendered by specific, conscious act.

In view of the foregoing, in my opinion the above question properly is answered as follows:

The abnormal relationship, which has existed with respect to this mother and child, as evidenced by the above factual situation, is such as to raise serious doubt of the application in this case of the general rule that the domicile of an illegitimate child is controlled by the domicile of the mother. Since such doubt exists that this child is a legal resident of Florida, it would not seem proper to admit the child as an inmate at Florida Farm Colony; hence, the question is answered in the negative.

November 2, 1945.—045-345.

USE OF INCIDENTAL FUNDS FOR REPAIRS, ETC.

QUESTION: May all or any part of the Incidental Fund of the Florida Farm Colony, deposited with the state treasurer, be used for repairs and additions to buildings of such colony?

To Honorable John T. Wigginton, Secretary, Board of Commissioners of State Institutions:

It appears that the Incidental Fund of the colony derives from "cash collections from pay patients, proceeds of sales of surplus farm products, salvage and other items, together with rebates such as return insurance premiums."

Under Section 3, Chapter 22827, Laws of Florida, Acts of 1945 (General Appropriation Bill), money received by the Board of Commissioners of State Institutions other than from state or federal sources for the colony, may be expended for the colony as the board may direct. Money received from pay patients is remitted to the state treasurer and by him placed "to the credit of the fund for the maintenance of the colony." Section 393.09, Florida Statutes, 1941.

It would seem that cash collected from pay patients and proceeds of sales of surplus farm products constitute funds not derived from state or federal sources. It is assumed that "salvage and other items" refers to sale of waste material and discarded or worn-out material and equipment; and if this is the meaning of such quoted words it would appear that money so realized would not be from a state or federal source. It is assumed that "rebates such as return insurance premiums" represent refunds of over-payments with respect to items paid from appropriated funds; and assuming this to be true, such money realized therefrom would be from a state source.

In view of the foregoing, it is my opinion that the above question properly is answered as follows:

Rebates such as return insurance premiums may or may not belong in the Incidental Fund. If the warrant for payment of the premium was drawn against incidental funds, the rebate should be deposited in such fund, but if drawn against funds provided by the general appropriation bill, the rebate should be deposited in that fund.

It is my opinion that the provisions of Section 11 of Chapter 22827, Acts of 1945, the general appropriation bill, apply to incidental funds appropriated by Section 3 of the same act; in other words, incidental funds may not be expended unless and until approved by the State Budget Commission. Accordingly, that part of such Incidental Fund accumulated from amounts from pay patients, from the sale of products produced on land of the colony, and from the sale of waste material or discarded or worn-out material or equipment, may be used for repairs or additions to the buildings of the colony but only when such expenditures shall have been approved by the budget commission.

June 20, 1945.—045-150.

INMATES—PAROLE OR RELEASE TO WORK OUTSIDE INSTITUTION

QUESTION: May an inmate of the Farm Colony for the Epileptic and Feeble-Minded lawfully be "paroled" or released into the custody of a person not connected with the institution and not related to the inmate, in pursuance of an agreement to be approved by the institution, whereby the inmate should perform services for such person for such consideration and on terms agreeable to the institution, the inmate and such person, or under any other plan resulting in such inmate's being released into the custody of any such person?

To Honorable John T. Wigginton, Secretary, Board of Commissioners of State Institutions:

Receipt is acknowledged of your letter of June 8, 1945, referring to the request of the board that the committee for the Farm Colony for the Epileptic and Feeble-Minded submit for consideration of the board a plan for the "paroling" of inmates of the institution to persons not connected with the institution and unrelated to the inmates so "paroled."

The superintendent of the institution states that under present plans the person to whom an inmate is "paroled" is required to remit a certain amount of salary due such inmate for services performed for such person to the institution to be placed to the credit of the inmate-parolee.

As the result of conference with the superintendent of the institution the names of four inmates "paroled" to work for others have been furnished the committee, together with detailed circumstances relating to the "parole" of such inmates and the persons to whom paroled.

Once a person is admitted to the institution (Sections 393.03 and 393.11, Florida Statutes, 1941), the Board of Commissioners of State Institutions becomes the legal guardian and custodian of such person (Section 393.04, Florida Statutes, 1941). The purposes of the institution are three-fold (Section 393.06, Florida Statutes, 1941), viz.: (1) As an asylum for the care and protection of the epileptic and feeble-minded; (2) As a school for the education and training of the epileptic and feeble-minded; and (3) As a colony for the segregation and employment of the epileptic and feeble-minded.

Removal, dismissal and transfer of inmates of the institution may be effected by the Board of Commissioners of State Institutions only under the circumstances prescribed by law (Section 393.05, Florida Statutes, 1941) as follows: (1) The board may in its discretion, dismiss the inmate to the care of the inmate's parents or former legal guardians and under the circumstances provided in said law; (2) The board may, in its discretion, dismiss an inmate from the institution whenever it shall appear to

be for the benefit of the inmate or institution that this be done; and (3) An inmate becoming insane may be transferred to the Florida State Hospital for the Insane (and see also, in this regard, Section 394.24, Florida Statutes, 1941).

Whatever may be done with epileptic and feeble-minded persons with respect to their admission to the institution, their care, treatment and work while there, or their discharge, or transfer therefrom, must be found in Chapter 393, Florida Statutes, 1941. There appears to be no provision for "parole" of inmates under the plan now apparently in use or under any other plan which contemplates releasing an inmate into the custody of a person not related to the inmate and not connected with the institution.

For the reasons stated above, in my opinion the above question should be answered in the negative.

February 9, 1945.—045-33.

SUPERINTENDENT—STATUTORY REQUIREMENT FOR BOND

QUESTION: What is the statutory requirement, if any, concerning bond for the superintendent of the Florida Farm Colony?

To Honorable John T. Wigginton, Secretary, Board of Commissioners of State Institutions:

This question is answered as follows:

I find no statutory provision requiring the superintendent of the Florida Farm Colony to furnish bond.

The file enclosed in your letter is returned herewith.

FLORIDA STATE HOSPITAL

June 10, 1946.—046-253.

NONRESIDENT ALIEN—ADMITTANCE

QUESTION: In February, 1939, a negro man was committed to Florida State Hospital by the county judge of Dade county, as a legal resident of the state. In March, 1941, he was furloughed to a woman in Miami, and in March, 1942, was discharged by reason of having been absent one year on furlough. After he had been furloughed, authorities at the institution ascertained he was a nonresident alien. On May 18, 1946, authorities at the Florida State Hospital received application from Department of Mental Hygiene, State of New York, for transfer of this man to such institution, the New York authorities advising he had been admitted to one of their institutions as a mental incompetent on April 11, 1946, that they were informed he had left Florida on January 2, 1946, and that he gave as correspondent his mother at a Miami, Florida, address. Properly, may this man be accepted at Florida State Hospital?

To Honorable J. H. Therrell, Superintendent, Florida State Hospital, Chattahoochee, Florida:

Section 394.27, Florida Statutes, 1941, provides that no person shall be committed to or received as a patient at Florida State Hospital who has not been a "bona fide resident" of this state continuously one year immediately preceding the examination of said person. Chapter 23157, Laws of Florida, Acts of 1945, amended certain parts of Chapter 394, Florida Statutes, 1941, but did not change said Section 394.27, at least in its present application.

The answer to the above question depends upon facts not disclosed by the letter. However, it is believed that the inquiry adequately can be

answered, conditioned upon the facts related to this man's residence in Florida.

It is assumed that this man was not a minor when first committed to Florida State Hospital, and that he has not continuously been mentally incompetent since prior to reaching his majority.

You should acquaint yourself with all the facts relating to this man's residence in Florida, and having done so, you may be guided by the following instructions:

(1) If at the time this man was committed to the institution in 1939 he had actually lived in Florida for the period of time prescribed by said Section 394.27 after having elected, prior to becoming mentally incompetent, to make Florida his place of residence, the fact that he was not a naturalized citizen of this country would not have precluded him from being a "bona fide resident" of Florida within the meaning of such section of our laws.

(2) If at the time of this man's commitment to the institution in 1939 he had been a "bona fide resident" of Florida for the period of time required by said Section 394.27, and from that day to this has continued to be mentally incompetent, he would still be such a "bona fide resident" of Florida.

(3) If this man was not such a "bona fide resident" of Florida at the time of his commitment to the institution in 1939, but became mentally competent thereafter and while mentally competent elected to make Florida his place of residence, and lived in Florida for the period required by said Section 394.27 after making such election, he became a "bona fide resident" of Florida within the meaning of such section of our law and continues as such, unless he terminated such residence under the circumstances set forth in the succeeding paragraph.

(4) If, in January, 1946, when this man moved from Florida to New York, he was mentally competent and then intended to establish his residence in such latter state, he ceased to be a "bona fide resident" of Florida within the meaning of said Section 394.27.

(5) It is recognized, of course, that if this man was a nonresident alien in 1939, and has continued to remain a nonresident, he is not eligible for admittance to the institution, under said Section 394.27.

December 28, 1945.—045-400.

DOMICILE OF INSANE WIFE

QUESTION: A husband and wife moved from Pennsylvania to Florida less than one year ago. The wife is at this time a mental case and needs treatment. The Dade county authorities are endeavoring to establish residence and return her to Pennsylvania. Her husband states that if she does go back he will continue to live in this area. If the wife goes back to Pennsylvania for treatment and if the husband remains in Florida for one year from the date he declared his intention to remain in Florida, upon the expiration of such year, could Florida State Hospital be required to accept the wife as a bona fide resident of Florida within the meaning of Section 394.27, Florida Statutes, 1941?

To Dr. J. H. Therrell, Superintendent, Florida State Hospital, Chattahoochee, Florida:

It is assumed from the above statement of fact that this husband has declared his intention of establishing his domicile in this state; and it is further assumed that this wife is in such mental condition that properly, if she met the residence requirement of our law, she might be committed to Florida State Hospital. It is on the basis of the above statement of

facts and these assumptions with respect thereto that this opinion is written.

Whether or not this wife may now be returned to Pennsylvania and there committed to an institution for the mentally afflicted must depend upon the laws of that state; and it would not be proper for me to attempt to set forth applicable provisions or to construe such laws. Hence, it would seem that the question presented by the above factual situation which properly may be answered is as follows: If this husband has announced a present intention to establish his domicile in Florida, after he has actually lived in Florida for one year from the date of making such determination, may his insane wife in another state be brought to Florida and admitted to Florida State Hospital?

It is recognized that ordinarily to establish residence there must be the mental capacity to elect to do so. However, it is the general rule, recognized in Florida, that the domicile and legal residence of the wife is that of her husband, she having the right only under certain circumstances, not evidenced here, of establishing a residence apart from that of her husband. *Curley vs. Curley* (Fla.), 198 So. 584; *Minick vs. Minick*, 111 Fla. 469, 149 So. 483. However, this office held in an opinion addressed to you, dated September 21, 1943 (Biennial Report of Attorney General, 1943-1944, page 360), that while such was the general rule, the provisions of the above Section 394.27 contemplated an actual residence within the state for the required one-year period rather than a constructive one. Such last mentioned opinion concerned an estranged wife of a Florida resident, she having resided in another state for a number of years; and the conclusions here reached are not in conflict with such former opinion.

In view of the foregoing, your question properly is answered in the negative, since it appears that "bona fide" residence, as contemplated by said Section 394.27, means actual physical residence in Florida; and if this wife returns to Pennsylvania she would not be in a position to claim such residence under the facts as stated.

July 11, 1945.—045-180.

BURIAL EXPENSES—USE OF PATIENT'S POSTAL SAVINGS

QUESTION: Has the Florida State Hospital (Board of Commissioners of State Institutions), the right to recover out of a postal savings account owned at the time of her death by an insane person who had been committed to the institution as an indigent patient, was supported therein by the state for remainder of the patient's life, and buried by the state, the amount expended by the state incident to her burial?

To Honorable John T. Wigginton, Secretary, Board of Commissioners of State Institutions:

The following is gathered or assumed from the correspondence mentioned: the patient was committed to the institution from Pinellas county as an indigent patient on December 30, 1937, remained there until death, and was buried on April 15, 1943, all at state expense; that recently it has been discovered that the patient had on deposit in a savings account at the post office in St. Petersburg the sum of \$21.00; that the patient died intestate; that there has been no administration of the patient's estate, and that such \$21.00 constitutes the entire estate in Florida.

By opinion of this office No. 042-411 of August 21, 1942 (Attorney General's Biennial Report, 1941-42, page 539), it was held that recovery out of the property or estate of a person for reasonable maintenance of such person at the state hospital was proper, and that "the mere fact that the insane person has been discharged from the hospital or has died would not affect the right to recover the cost of maintenance" of such person (emphasis supplied). It would appear that the same rule would apply to expenditures by the institution for preparation of a patient for

burial and interment. Proper burial of a deceased patient by authorities of the institution is required in accordance with both humanitarian and legal principles (see opinion of this office, No. 041-688, December 5, 1941, Attorney General's Biennial Report, 1941-42, pages 532, 533).

Section 758, Title 39, U.S.C.A., authorizes the postmaster general to prescribe regulations under which funds deposited in postal savings accounts may be withdrawn. The attorney general of the United States has ruled that this section charges the postmaster general to make regulations dispensing with administration proceedings in settlement of accounts of deceased depositors in the postal savings service, provided such regulations be reasonable, adapted to discovery of truth, and based upon general legal principles governing distribution of estates of deceased persons (29 Op. Atty. Gen. 477, as digested in notes and decisions following Sec. 758, Title 39, U.S.C.A.).

Regulations pertaining to this subject have been promulgated by the postmaster general (Postal Employees' Guide, page 148, Sec. 19). Such Section 19 provides that if a depositor dies intestate and no personal representative is appointed and the deposit is not more than \$500, after allowing for funeral expenses and expenses of last illness, next of kin may apply for the deposit; and it is further provided that if the funeral expenses (or other claims for which the state is liable under the laws of the state in which the money is deposited), have not been paid, the undertaker or other preferred creditor may apply on Form P.S. 115. The estate under Florida law is liable for funeral expenses, and in absence of administration claim therefor is first in order of priority (Section 733.20, Florida Statutes, 1941).

In view of the foregoing, it is my opinion that the above question is properly answered in the affirmative, and that appropriate claim should be made, on the postal form required, for the amount of such postal savings account or for so much thereof as may be necessary to reimburse the State for the funeral expenses of the patient referred to above.

There is returned herewith the above letter to you from Dr. "A" and the copy of letter from Mr. "B" to Dr. "A."

May 6, 1946.—046-191.

PAY PATIENT—CHANGE IN STATUS

QUESTION: Can a county judge amend the commitment of a patient in the Florida State Hospital to change her status from "pay" to "indigent?"

To Honorable McKenney J. Davis, County Judge, Duval County, Jacksonville, Florida:

In July, 1940, the county judge of Duval county, committed to the Florida State Hospital a "pay" patient. At the time of this commitment the husband of the patient was in financial condition to make regular payments and did make regular payments; that afterwards his financial condition changed so that he is now no longer able to make these payments; that the superintendent of said hospital has advised you that it is necessary to amend the commitment of this patient by which her status from a pay patient to an indigent patient will be made, and that it is the duty of the hospital to carry out the original order unless and until amended; that you know of no provisions whatever for you as such county judge to amend a commitment in this manner, and you desire to know what is the proper procedure.

As the law stood in 1940 (see Chapter 19163, Acts of 1939, paragraph 4; 3658, paragraph 6, C. G. L.) it was the duty of the county judge, by or under his direction, to determine whether a person supposed to be insane and prior to the completion of the examination by the committee,

was indigent or destitute, or whether said person had an estate or relatives who were able to pay in full, or in part, for treatment in the Florida State Hospital. This information was to be embodied in a report which was to be attached to and transmitted with the commitment papers to the superintendent of the Florida State Hospital.

This law was repealed by Chapter 20504, Laws of 1941, and no such or similar duty was placed upon the county judge, but the duty of determining whether or not such person was indigent or possessed sufficient means for his or her support was imposed upon the examining committee.

Our present incompetency statute, Section 394.21, Florida Statutes, 1941, as amended by Chapter 23157, Laws of 1945, imposes the same duty upon the examining committee.

Inasmuch as the county judge does not now determine whether or not the person is indigent or possesses sufficient means for his or her support, but that duty is upon the examining committee, I cannot see that it is the duty of the county judge to issue any amendment to his commitment. Whether such person should pay or not pay for his or her treatment in the said hospital is a question to be decided by the Board of Commissioners of State Institutions.

I would suggest, therefore, that in this case, the husband of the insane patient present the evidence showing that he is unable to pay and cannot pay for the care of his wife to the Board of Commissioners of State Institutions, and that board can act accordingly.

July 17, 1946.—046-305.

INDIGENT INSANE—GUARDIAN—DUTIES

QUESTION: On September 30, 1939, Mary Francis Moore, a white female person, was adjudged to be insane and shortly thereafter was committed to the Florida State Hospital as an indigent person. On November 30, 1943, a guardian was appointed for the said incompetent and on that date her estate became beneficiary of a considerable sum of money. You desire to know if the guardian of the estate should pay the Florida State Hospital for all of the expenses of the said insane person from the date of the first commitment in 1939, or should the estate be responsible for the back maintenance from the date that the guardianship was created and funds came into this guardianship on November 30, 1943?

To Honorable J. E. Peacock, County Judge, Volusia County, DeLand, Florida:

When this insane person was committed to the state hospital she was committed as an indigent person and she remained an indigent person until November 30, 1943, when she inherited certain moneys.

Therefore, on November 30, 1943, her status as an indigent person changed.

It is my opinion that her estate should pay the Florida State Hospital from the time the guardianship was created and the estate received the funds, to wit: November 30, 1943.

July 19, 1946.—046-244.

NONRESIDENT INCOMPETENT—COMMITMENT

QUESTION: In 1933, the parents of an incompetent son were divorced in Dedham, Massachusetts. The custody of the son, by agreement, was granted to the father. Shortly after said divorce, the mother

took the son to England, where he remained until returned to this country on an army transport in 1945. Since November, 1945, the son has been an inmate of a Massachusetts hospital for the mentally afflicted. The son is 26 years of age and has been mentally incompetent all his life. The father has resided in St. Petersburg, Florida, for a number of years. Is this incompetent son eligible for commitment to Florida State Hospital as a "bona fide resident" of Florida for the period of time and as contemplated by Section 394.27, Florida Statutes, 1941?

To Dr. J. H. Therrell, Superintendent, Florida State Hospital, Chattahoochee, Florida:

While the information furnished is not clear upon the point, it is here assumed that this father is now living, and for the past three or four years has lived, in St. Petersburg, Florida, and that he resides and maintains his domicile there.

Section 394.27, Florida Statutes, 1941, provides that no person will be received as a patient for treatment at Florida State Hospital who has not been "a bona fide resident of the State of Florida continuously for one year immediately preceding the examination of such person."

It is recognized that the domicile of a minor child ordinarily is fixed by the father, *Chisholm vs. Chisholm*, 98 Fla. 1196, 125 So. 694; *Minick vs. Minick*, 111 Fla. 469, 149 So. 483. Further, the domicile of an insane minor is ordinarily the domicile of his father and continues to follow that of the father even after majority. 28 C. J. S. page 27, Section 12 (e); *Monroe vs. Jackson*, 55 Me. 55.

Nevertheless, this office has heretofore held that the "bona fide" residence for one year as contemplated by said Section 394.27 means actual, physical residence in Florida for such period of time prescribed by the statute. See our opinion No. 043-249, dated September 21, 1943, and our opinion 045-400, dated December 28, 1945.

In view of the foregoing, in my opinion the above question properly is answered as follows:

Since it appears that "bona fide" residence as used in said Section 394.27 contemplates actual, physical presence in this state for the period of time therein required, it would seem that the residence of this incompetent's father in Florida could not inure to the former's benefit in this connection. Hence, this incompetent person, who apparently has never lived in Florida, would not be eligible for commitment to Florida State Hospital as "a bona fide resident of the State of Florida continuously for one year immediately preceding the examination of such person."

November 12, 1946.—046-468.

INCOMPETENT—SERVICE OF NOTICE

QUESTION: Shall the sheriff serve the incompetent as required by Section 394.21, Florida Statutes, 1941, personally or may same be made on a member of the family as in the case of summons ad respondendum?

To Honorable William C. Brooker, County Judge, Hillsborough County, Tampa, Florida:

Said Section 394.21, Florida Statutes, 1941, says:

"Whenever a petition is filed under the provisions of Section 394.20 . . . reasonable notice shall then be given in writing to the alleged incompetent and to one or more members of his family."

In my opinion this requires that the notice shall be served personally on the incompetent and on one or more members of his family. I believe that you can see the logic of this reasoning for if it were possible to make the service of such notice upon a member of the family as in the case of summons ad respondendum there would have been no occasion for the legislature to have designated the service to be made "upon the incompetent and one or more members of his family."

November 26, 1946.—046-485.

INCOMPETENT—SERVICE ON RELATIVE

QUESTION: What method of service shall be had on the non-resident member or members of the family of an incompetent as provided by Section 394.21, Florida Statutes, 1941, as amended?

To Honorable William C. Brooker, County Judge, Hillsborough County, Tampa, Florida:

The opinion I rendered you on November 12, 1946, was limited to service of notice on the incompetent, and I there held that such notice must be served personally on the incompetent.

Section 394.21, Florida Statutes, 1941, as amended says:

"Whenever a petition is filed under the provisions of Section 394.20, the county judge, or, in his absence or disability, a circuit judge, shall set a date for an immediate or a very early hearing on the petition. Reasonable notice shall then be given in writing to the alleged incompetent and to one or more members of his family, if any (other than petitioner), **are known to the county judge to be residing within his jurisdiction**, notifying them that application has been made for an inquiry, etc." (Underscoring supplied)

By a careful reading of said Section 394.21, Florida Statutes, 1941, as amended, the notice to the members of the family is required **when they are known to the county judge to be residing within his jurisdiction**. The statute does not seem to contemplate service of notice on the incompetent's family unless the members of the said family are known to the judge to be within his jurisdiction.

While it is not required by law, I do think it is a wise policy for the county judge to notify the members of the incompetent's family even though they do not reside within his jurisdiction, and I think notice sent to such member or members of the family by registered mail and affidavit of such mailing with "return receipt" attached would be sufficient.

December 3, 1946.—046-516.

INCOMPETENTS—CUSTODY PENDING ACCEPTANCE

QUESTIONS: When persons have been adjudicated mentally incompetent as provided by Section 394.22, Florida Statutes, 1941, as amended, and pending notice of acceptance and delivery to the Florida State Hospital, what shall be done with incompetents who fall under one of the three classes, to wit:

1. When incompetent is not violently insane?
2. When the incompetent evidences tendency toward self-injury, destruction or damage of property or injury to others?
3. When the incompetent has been previously admitted to the Florida State Hospital and has been out on furlough and notice from the

hospital has been received of patient's acceptance for re-commitment to the hospital?

To Honorable William C. Brooker, County Judge, Hillsborough County, Tampa, Florida:

I assume that all of the persons to whom you refer are residents of Florida within the meaning of Section 394.27, Florida Statutes, 1941.

Section 394.22, Florida Statutes, 1941, as amended, paragraph (3) says:

"(3) **Commitment.**—(a) Whenever any person who has been adjudged mentally incompetent requires confinement or restraint to prevent self-injury or violence to others, the said judge shall direct that such person be forthwith delivered to the superintendent of the Florida State Hospital for care, maintenance and treatment as provided in Sections 394.09, 394.24, 394.25, 394.26 and 394.27, or make such other disposition of him as he may be permitted by law."

As to the first class of incompetents, those who are not violently insane, but who, I assume, do require confinement or restraint, as provided in the said section, I see no reason why you cannot commit them into the custody of someone who will care for these persons until they can be taken into the hospital at Chattahoochee.

As to incompetents who would come under the second classification, I think that you have authority under the law to turn these over to the sheriff to be incarcerated in the jail, or some suitable place, where they will not be liable to injure themselves or others until they can be received into the hospital.

As to the third classification, it will depend upon whether they will come under the first or second classification above mentioned and they should be handled by you according to what class they do come under.

I do not pass upon the question as to who will bear the cost of keeping these incompetents.

March 28, 1946.—046-111.

NONRESIDENTS AS PATIENTS

QUESTION: Is Chapter 23157, Acts of 1945, applicable to the examination of competency of a nonresident?

To Honorable William C. Brooker, County Judge, Hillsborough County, Tampa, Florida:

In my opinion, you can make a judicial inquiry as to the mental or physical condition, or both, of any person within your county upon the proper petition (see Section 394.20, as revised by said Chapter 23157). However, I would call your attention to Section 394.27, Florida Statutes, 1941, which was not repealed by said Chapter 23157, which says:

"No person shall be committed to or received as a patient for treatment in the Florida State Hospital who has not been a bona fide resident of the State of Florida continuously for one year immediately preceding the examination of such person."

CHAPTER XXIV

SOCIAL WELFARE

STATE BOARD OF PUBLIC WELFARE

September 12, 1946.—046-385.

PRIVATE NURSING HOMES—STATE SUPERVISOR

QUESTIONS: 1. Does Florida law authorize supervision of private homes and children's nurseries?

2. What provision is made for enforcement?

To Honorable Millard F. Caldwell, Governor:

The first question must be answered in two parts, to wit:

A. I have been unable to find anything in the Florida Statutes which authorizes direct supervision of these private nursing homes, children's nurseries, etc., which do not have custody of, or care for, dependent or delinquent children.

B. Sections 409.03, 409.04 and 409.05, of Florida Statutes, 1941, provide that the following children shall be subject to the protection, care and guidance of the State Welfare Board or any duly licensed public or private agencies:

(1) Children with improper guardianship, among whom shall be numbered abandoned and neglected children,

(2) Destitute children,

(3) Mentally defective or physically handicapped children,

(4) Morally defective children,

and that with written consent of parents or guardians, the state board, under rules and regulations properly established, may place a child in a home or institution, private or public, paid or free, or in a foster home. Further, the state board may set minimum standards for the care of dependent children away from their own homes and shall prescribe, amend or alter such rules and regulations as may be necessary for the care and supervision of such children, and no person other than a relative or a person who is considering the adoption of a child in the manner provided for by law, and no institution, society or association may receive a dependent child for boarding or custody, unless such a person, society, association or institution shall have first procured a license from the state board empowering or authorizing such person, association, institution or society to care for, receive or board a child or children.

Sections 415.17, 415.20, 415.26 provide that county judges may commit delinquent or dependent children to the care of some suitable state or county reformatory or some suitable private institution, association, corporation, etc., willing to receive such children. The judge may thereafter set aside, change or modify such order or commitment in his discretion, and may at any time require from any association, institution or person receiving such children, reports, information, and statements as the judge may deem proper or necessary for his action.

As to provision for enforcement of supervision, Section 409.05 provides that any license issued empowering or authorizing a person, association, institution, or society to care for, receive or board a child or children may be revoked by the State Welfare Board in its discretion, and provides further that if such order is not reasonably complied with, the state board shall apply to a court of equity for such relief, mandatory or injunctive, as the case may require.

Section 409.03 provides that juvenile courts and judges shall give full and sympathetic cooperation to State Welfare Board in carrying out the purposes and intent of the law.

March 19, 1945.—045-72.

LICENSING MATERNITY HOMES

QUESTION: Is the State Welfare Board charged with the responsibility of licensing maternity homes?

To the State Welfare Board, Jacksonville, Florida:

I find nothing in the statutes which requires or authorizes the State Welfare Board to license maternity homes, except Chapter 21013, Laws of Florida, Acts of 1941, which chapter is applicable only to counties having, or which may hereafter have, a population of over 267,000; and even in such counties your board is not required or authorized to license maternity homes under state or municipal ownership or control. It is my opinion that the State Welfare Board is not charged with the responsibility for the licensing of any maternity homes, except in counties having a population of over 267,000.

August 30, 1946.—046-410.

DEPENDENT CHILDREN—CUSTODY

QUESTIONS: 1. Does Chapter 409 of the Statutes of 1941, authorize the State Welfare Board to accept the custody of dependent children?

2. Is the State Welfare Board authorized to accept the guardianship of children and may children be permanently committed to the board in such manner as to give the board the authority to place such children in homes for the purpose of adoption?

3. Is the State Welfare Board an institution within the meaning of Section 415.17 of the statutes to which the judge of the juvenile court is authorized to commit dependent children?

4. What areas of conflict are there between the rights and responsibilities given to the State Welfare Board under Section 409.03 or any other statutes and those given to the juvenile and domestic relations court of Dade county in regard to dependent children in Dade county? In the event of conflict, which law would take precedence?

5. Do the county commissioners of Dade county have the legal right to appropriate funds to the district welfare board for the care of dependent children in that county?

To State Welfare Board, Jacksonville, Florida:

Your questions involve consideration of the duties, rights and jurisdiction of the State Welfare Board, the juvenile and domestic relations court of Dade county and the county commissioners in matters pertaining to dependent children of Dade county.

There is no reference in your inquiries to delinquent children and I assume, therefore, that your present problems relate only to dependent

children. Accordingly, I have considered the questions only in connection with dependent children.

The statutory plan of the State Welfare Board is far more than a disbursing agent of public financial aid. Under Chapter 409 of the statutes it is given a very broad field of duties in the matter of the social welfare of the people. Section 409.02 reads, in part, as follows:

"The state board may accept such duties in respect to public aid or social welfare as may be delegated to it by any agency of the federal government, state government, or any county or municipal government; and may act as agent of the federal government, state government, or any county or municipal government in the conduct or administration of public aid and social welfare activities and in the disbursement of funds received from the federal government, state government, or any county or municipal government for public aid and social welfare purposes within the state, such as assistance to unemployed and to those who for any reason are unable to provide for their own needs, aid to dependent children, mothers' aid, blind, old age relief and the like."

Section 409.03 imposes on the State Welfare Board the duty of protecting, caring for and guiding children with improper guardianship, including abandoned and neglected children and destitute children. Section 409.04 authorizes the state board to cooperate with all qualified welfare institutions or agencies for the well being of such children. Section 409.15 authorizes the State Welfare Board to establish and operate almshouses and public homes for the indigent. From these provisions of the chapter it is clear that the State Welfare Board has ample authority to accept the custody of dependent children.

The second and third questions may be answered together. In effect, they inquire whether the State Welfare Board may function as a child placing agency.

After providing that the State Welfare Board should cooperate with all child welfare institutions or agencies meeting its standards, Section 409.04 authorizes the board with written consent of parents or guardian to place a child in a public or private home or institution, or in a foster home and to remove the child from such institution, home or agency and replace it when it appears to be to the best interest of the child. Section 415.17, amended in 1943, authorizes the county judge (judge of the juvenile court) to commit a dependent child to the care of some suitable state or county reformatory or institution or to some suitable citizen or private institution willing to receive it and embracing in its objects the caring for or obtaining homes for dependent children. Consideration of these statutes as well as the other sections of Chapter 409 referred to above, lead to the conclusion that your second and third questions must be answered in the affirmative. The board, when guardian, is guardian of the person only, not of the child's property; and may be guardian of the person only in those cases and circumstances set out in the statutes.

Your fourth question inquires as of the areas of conflict between the rights and responsibilities of the State Welfare Board under Section 409.03 or other statutes and those given to the juvenile and domestic relations court of Dade county in regard to dependent children of that county.

There is no conflict in the statutes. I have referred above to the very broad authority, duty and responsibility of the State Welfare Board in regard to dependent children. The juvenile and domestic relations court of Dade county, established by Chapter 19597 of the Laws of 1939 and its several amendments, gave to that court broad jurisdiction over children under the age of 17 requiring public care among which is authority to provide by court order for the care, support and disposition of such children who may come before the court, even, when necessary, against

the consent of the parents or guardian. Section 415.19. In the manner set out in the statutes the State Welfare Board may assume custody of a dependent child, act as non-judicial guardian of its person, place it in a home or for adoption, operate and maintain homes for such children and in general attend to all of such child's care and needs so long as the child has not, under the statutes, come before the juvenile court, or may perform all those duties if the child should be committed to the board by the court; but when a dependent child, in pursuance of the statute, has come before the juvenile court, the court has full authority to make provision for its care, custody, and placement, either temporary or permanent. On the one hand the welfare board may not interfere with the functions of the juvenile court when that court has taken jurisdiction of the child in the manner set out in the statutes; those are judicial functions. On the other hand, no authority is given to the juvenile court or any other court to establish, operate or maintain, directly or indirectly, homes for dependent children; that is the function of public and private agencies and institutions which have for their purpose the care of dependent children, and when conducted by public agencies, it is a part of the executive functions of government. (Sections 416.07 and 416.08, providing for a board of visitors, even if constitutional, relate only to homes for delinquents.) Section 409.03 specifically requires the juvenile courts to give full and sympathetic cooperation to the State Welfare Board and its employees in carrying out the purposes and intent of the Welfare Act. Likewise, Chapter 19597, requires all state, county and city officers and institutions or agencies concerned with child care, (which would include the Welfare Board) to cooperate with the juvenile court. The fields are separate and sufficiently distinct; there is no overlapping if each remains in its proper sphere of authority and duty.

Answering your fifth question.—I find no authority for appropriation or disbursement by the county commissioners of county funds to the district welfare board for the care of dependent children of the county except where the county commissioners retain control of the home. However, the county commissioners may make use of the district welfare board, as its agency, in carrying out lawful county welfare work. In that connection I call your attention to Section 125.01 (4) of the statutes which authorizes the county commissioners "to have care and provide for the poor and indigent people of the county." Dependent children would be within that class. Our court has held that the board of county commissioners have not only such powers as are expressly vested in them by statute, but also such powers as must be necessarily implied to carry into effect the powers expressly vested. See *Crandon v. Hazlett*, 26 So (2d) 638. Operation and maintenance of a home for dependent children is well within the authority expressly granted the county commissioners by Section 125.01(4). Chapter 20476 of 1941, recognizes such authority in that it authorizes a levy of a tax in counties of 250,000 population which shall maintain under the control of the county commissioners a home for the poor and indigent. It is my opinion that the county commissioners have ample authority to establish, maintain, and operate a home for dependent children whenever in their sound judgment it may be necessary in order to adequately provide for dependent children of the county. However, when such a home is established by the county commissioners it must remain under the control of the county commissioners. The county commissioners have authority to make an arrangement or agreement with any suitable person or agency, including the State or District Welfare Board, to supervise and administer such a home, but always under the control of the county commissioners.

July 9, 1946.—046-296.

CHILDREN'S BOARDING HOUSES—REGULATIONS—LIBEL

QUESTIONS: 1. In the event the State Welfare Board should take legal action by injunction or otherwise to enforce compliance with the provisions of Chapter 21013 or the board's minimum standards established

pursuant to said chapter, and such suit were lost, would the State Welfare Board or its members or staff be liable in an action by the defendant for libel based upon defamatory allegations in the plaintiff's pleadings or testimony?

2. Where a boarding home for children as described in the act has been refused a license because the home refuses to comply with reasonable minimum standards established by the Welfare Board pursuant to the said act, is it the duty of the State Welfare Board to resort to a court of chancery to stop the operation of such boarding home?

To Mr. David J. Lewis, Attorney, State Welfare Board, Jacksonville, Florida:

The act imposes on the State Welfare Board the duty of establishing minimum standards of care for children under 17 who are cared for when away from their parents, etc. It requires the operator of such boarding homes to obtain a license from the State Welfare Board and requires approval of the application by the State Board of Health.

It is impossible to give you a definite answer to the first question because I do not know what charges against the defendant would be included in the proceedings. However, the law in this State is well settled that defamatory words are absolutely privileged when published by parties, counsel or witnesses if such words are connected with or relevant or material to the cause even though such defamatory words are absolutely false. In *Fisher vs. Payne*, 113 So. 378 the second headnote reads as follows:

"In order that defamatory words, published by parties, counsel, or witnesses in the due course of a judicial procedure may be absolutely privileged, they must be connected with or relevant or material to the cause in hand or subject of inquiry. If they be so published and are so relevant or pertinent to the subject of inquiry, no action will lie therefor, however, false or malicious they in fact be."

See also *Myers vs. Hodges*, 44 So. 357. I see no reason for the Board or members or the staff to fear a libel suit if they should lose any action filed to enforce compliance with the act, so long as they stay within the very broad privilege recognized by our court, as set out above.

Chapter 21013 requires the operator of boarding homes described in the act to obtain a license but no penalties are imposed for operation without a license nor is any other remedy provided for enforcement of that particular portion of the act, that is, operation without a license. Another provision of the act does provide a remedy, by injunction, for operation after a license has been revoked. There is a general rule that injunction will not lie to prevent an act merely because the act is illegal, but there are exceptions when the general welfare, public health, etc., are involved. The minimum standards established by the Board would be an issue in such suit at least to the extent of the particular regulations to which the defendant refuses to conform.

There is another hurdle which, in my opinion is more difficult, and that is the validity of the act itself. Chapter 21013 is a population act applicable to counties which in 1941 had a population of 267,000 and to counties which thereafter might have such a population. It was not published but was passed as a general act. The question is whether or not such classification of counties is a reasonable classification; if not, the court will hold it a local or special act and unconstitutional because not published. A great many of such acts have been held invalid. In *Anderson vs. Board of Public Instruction*, 136 So. 334, our court has set out what is proper and improper classification.

"While, as we have pointed out, a law may be constitutionally considered as general and of uniform operation throughout the

State when predicated upon a classification of counties for governmental purpose based upon population, notwithstanding the result immediately following it may be that the particular statute at the beginning of its operation only applies to one county having a population within the limits specified, it is nevertheless true that any such classification based on population and the like must be bottomed upon considerations which demonstrate that the counties so classified and grouped together in the one act coincide with one another in some certain particular and differ from other counties in that same particular so as to warrant the Legislature in specially dealing with the classified county or counties with respect to the subject of the act as applied to the counties so classified."

Also see *State vs. Coleman*, 3 So. (2d) 802, where the Supreme Court construed a population act which regulated the hours of sale of liquor but was applicable only to counties of more than 265,000 (Dade county). The court said it could find no reasonable connection between the population of a county and the sale of liquor at a particular hour of the day in that county which would not apply with like effect to a county of less population.

It is not clear to me that there is any difference in the need for regulating boarding homes for children in counties of 267,000 which do not exist in counties of 200,000 or any other population and I doubt whether the court will find the classification in this act a proper one.

On the other hand, until the act is declared by the court to be invalid it is the duty of the State Welfare Board to enforce it. If it is held to be invalid the counties which are interested in such an act will then have the opportunity at the next session of the legislature to enact valid acts on the subject if they see fit to do so.

May 17, 1946.—046-206.

OLD AGE ASSISTANCE—APPROPRIATION

QUESTION: In view of the fact that Chapter 22923 of the Laws of 1945 in effect repealed that part of Section 561.12 allocating certain beverage taxes to the old age assistance fund, is the \$3,400,000 appropriated by Section 409.22 of the statutes payable from general revenue or must it be paid from the proceeds of racing, breaks and jai alai taxes which are appropriated to old age assistance?

To Honorable J. M. Lee, State Comptroller:

If the \$3,400,000 appropriation provided in Section 409.22 is payable from the racing, breaks, and jai alai taxes it will result in an over-all maximum of \$8,000,000 for old age assistance, aid to the blind and administrative costs. If it is payable from general revenue it will result in an additional \$3,000,000 of state funds for old age assistance, plus an additional \$3,000,000 federal matching funds; in other words, the answer to the question makes a difference one way or the other of approximately \$6,000,000 for old age assistance.

The serious consequences to those receiving old age assistance and the amount involved has required a deep study of the problem, and has included a careful consideration of the history of the old age assistance acts from their origin in 1937 to date, as well as the beverage tax and racing tax statutes, which are the other acts involved; and all have been construed in the light of the circumstances and known facts which accompanied their enactment.

I have alluded to the serious consequences which would result from a construction limiting state funds to \$8,000,000 for old age assistance.

To mention a few of them,—that figure would require the discontinuance of all old age assistance for the remainder of this fiscal year; it would require a substantial reduction in all allowances during the next fiscal year, and it would make it impossible to put on the pay roll any of the large number of new applicants qualifying for old age assistance from month to month. In transferring the beverage tax to general revenue, it is my opinion that the sole purpose of the legislature was to further its recent program of depositing as much of state revenue as possible into the general revenue fund and disbursing from that fund, and that there was a complete absence of intention on the part of the legislature to thereby reduce or in any manner affect old age assistance. That act was passed when it was well known that a maximum of \$8,000,000 from state funds would not be sufficient to continue the then current program of old age assistance in the event the war should end. Furthermore, it may be accepted as a fact that there was no intention whatever in the legislature to reduce the current allowance for old age assistance at a time when it was quite apparent that the rapidly increasing cost of living was making it very difficult for the old age beneficiaries to subsist on their then allowances. It was in such atmosphere that Chapter 22923 was enacted.

The following is a brief statement and history of the statutes involved in the question.

During the 1937 session of the legislature there were numerous social welfare acts introduced. Only one of them, the present Welfare Board Act, became a law. That act included Section 409.22 which will be referred to later. Weaving its way through the same legislature was a revision of the Beverage Act. One part of this revised act was Section 561.12.

Prior to its amendment in 1945, Section 561.12 provided that all funds collected by the state under the beverage law

"are appropriated to and shall become a part of the old age assistance fund and old age pension fund for the payment of old age assistance and old age pensions as the same may be made and provided for by the legislature of the State of Florida; provided, however, that any surplus money existing after payment of old age assistance, blind and needy children prescribed in the beverage law shall be paid into the state treasury to the credit of the county school fund."

Section 409.22, a part of the Welfare Act, reads in part as follows:

"There is hereby appropriated each year from the general revenue fund of the State of Florida or any funds specifically allocated to old age pensions or old age assistance by any law of the State of Florida the sum of three million four hundred thousand dollars to be used for old age assistance and to aid the needy blind and administrative costs of performing the duties of the board under this chapter."

Later, the \$3,400,000 became insufficient for the program, and subsequent sessions of the legislature, including 1945, provided additional funds for old age assistance from horse and dog racing taxes, breaks and the game of jai alai. These acts levying and appropriating to old age assistance certain taxes on racing, breaks and jai alai, as amended in 1945, now appear as Sections 550.16, 550.26, 551.09, and 551.13, of the 1945 Cumulative Supplement, and the proceeds will be hereinafter referred to generally as racing taxes. Each of these statutes provides that the tax collected shall be "known as the old age assistance tax" and when collected shall be known as "the old age assistance tax fund," and further provides that,

"When the tax hereby levied is paid into the state treasury it shall become and be made a part of the 'old age assistance tax fund' and all funds on hand in the office of the state treasury in

the 'old age assistance tax fund' shall stand appropriated and shall be available to meet any contributions on behalf of the United States for the benefit of the citizens or inhabitants of this state when age shall be a basis or cause."

Other statutes were enacted guaranteeing a minimum for old age assistance from these racing taxes. The latest and the only one with which we are concerned, was Chapter 22816 of 1945, now appearing as Section 409.31, Cumulative Supplement. The effect of this act was to appropriate \$4,600,000 for old age assistance from general revenue to such extent as the racing taxes appropriated to old age assistance should not reach that amount; but the racing taxes have greatly exceeded the guaranteed amount, and will produce in the present fiscal year from \$7,500,000 to \$7,600,000.

The last mentioned sum together with the \$3,400,000 beverage tax ear-marked by Section 561.12 for old age assistance would produce a total of state funds for that purpose of approximately \$11,000,000; but in the 1945 session, Section 561.12, the above statute allocating beverage taxes to the old age assistance fund, was in effect repealed by its amendment. As amended, that section now makes all beverage taxes payable into general revenue.

The \$3,400,000 appropriated by Section 409.22 has always been paid from the beverage tax allocated for old age assistance. Now, by reason of the transfer in 1945 of such beverage taxes to general revenue we are faced with the problem of whether this \$3,400,000 appropriation provided in Section 409.22 is payable from the racing taxes or from general revenue; resulting, as pointed out above, in the difference, one way or the other of \$3,000,000 from state funds for old age assistance and a like amount from federal funds.

It is my opinion that the \$3,400,000 appropriation is payable from general revenue.

It will be noted that Section 409.22 appropriates \$3,400,000 each year from the general revenue fund of the state or any funds specifically **allocated** to old age assistance, etc. On the other hand, all of the racing taxes are **appropriated** for old age assistance. There is a wide difference in the meaning of the words "**allocate**" and "**appropriate**." "**Allocation**" means the setting aside into a fund for a special purpose but it does not include authority for disbursement. It merely ear-marks certain money for certain purposes. It requires further action by the legislature to authorize its disbursement. On the contrary, "**appropriation**" includes the power and authority to disburse for a designated purpose. Such distinction has been recognized by the courts.

Section 561.12 of the beverage act prior to 1945 did not appropriate the money for old age assistance. It merely allocated or ear-marked that money. While it uses the words "appropriated to and shall become a part of the old age assistance fund" it is not an appropriation in the usual meaning of the word. The quoted words are immediately followed by the limitation, "as the same may be made and provided for by the legislature." It required further action by the legislature for authority to disburse, and that legislative authority was supplied in another act of the same session (1937), Section 409.22 of the Welfare Board Act. With the amendment of Section 561.12 in 1945 there remains no longer any "specifically **allocated** funds for old age assistance." We now have only funds **appropriated** for old age assistance, that is, the racing taxes. Therefore, since Section 409.22 appropriated "from the general revenue fund of the State of Florida or any funds specifically **allocated** to old age pensions," and since the 1945 legislature eliminated the only fund **allocated** for that purpose, the \$3,400,000 appropriation provided in Section 409.22 must be from general revenue.

Summarizing what is said above, it is my opinion that these statutes make available \$3,400,000 for old age assistance, aid to the needy blind and administrative costs and that such appropriation is payable from general revenue. In addition thereto there is available for old age assistance the racing taxes described above and appropriated for that purpose.

September 11, 1946.—046-375.

OLD AGE PENSION—INCREASED FEDERAL GRANT

QUESTION: May the State Welfare Board pass on to the old age recipients and to the blind the additional \$5.00 maximum grant to the state provided by the Social Security Act Amendments of 1946, Title V, for old age assistance, aid to dependent children, and aid to the blind, in those cases where this would result in allowing monthly assistance of more than \$40.00?

To Honorable Leland Hiatt, Commissioner, State Welfare Board:

The question does not include the amendment's additional aid for dependent children because the absence of a state maximum removes any question as to dependent children.

Prior to the 1946 amendment the Social Security Act, as amended, granted to the states an amount for old age assistance equal to one-half of the total of the sums expended for old age assistance under the state plan, not counting so much of such expenditure for any individual for any month as exceeded \$40.00. Due to the emergency created by the greatly increased cost of living, Congress by an amendment of August 10, 1946, increased the federal grant by amending Section 3 (a) of the Social Security Act, as amended, by granting to each state,

"an amount, which shall be used exclusively as old-age assistance, equal to the sum of the following proportions of the total amounts expended during such quarter as old-age assistance under the state plan with respect to each needy individual who at the time of such expenditure is sixty-five years of age or older and is not an inmate of a public institution, not counting so much of such expenditure with respect to any such individual for any month as exceeds \$45—

'(A) Two-thirds of such expenditures, not counting so much of any expenditure with respect to any month as exceeds the product of \$15 multiplied by the total number of such individuals who received old-age assistance for such month, plus

'(B) One-half of the amount by which such expenditures exceed the maximum which may be counted under clause (A);"

The amendment covering aid to the blind is identical.

The question is whether the quoted language of Section 409.16 prohibits the allowance to old age assistance of this additional federal contribution where the monthly allowance would exceed \$40.00.

I have carefully considered the Social Security Act and its amendments, and the State Welfare Act and its amendments. The Social Security Act contains certain requirements for any state plan and the state plan was built upon the Social Security Act. The two acts must be read together. I have also considered the policy of the Florida legislature. That policy, clearly shown in the Welfare Act, was to take advantage of all federal grants in aid of social welfare. It was never contemplated that the \$40.00 per month should be state money but rather, that one-half of it only should be state money and the other half supplied by the federal grant. Certainly, there was no intention of the legislature to limit the monthly amount to \$40.00 if additional assistance should be made

available from federal funds without requiring an increase of the state contribution. Construing the federal and state acts together I am convinced that Section 409.16, for old age assistance is not to be construed as fixing an absolute limit of \$40.00 but as fixing a limit of one-half of that amount of state money with an equal amount, or more, obtained from federal grants.

It is my opinion that the State Welfare Board may pass on to the recipients of old age assistance the additional federal funds supplied by the Social Security Act Amendment of 1946, even though the monthly allowance should exceed \$40.00 but not exceed \$45.00, and so long as the state money, as distinguished from the federal contribution, does not exceed \$20.00 per month.

In providing aid for the blind, Section 409.17 is identical in language with the quoted portion of Section 409.16, and all that is said herein as to old age assistance applies with equal force to recipients of aid to the blind.

October 7, 1946.—046-416.

FLORIDA COUNCIL FOR THE BLIND—TORT LIABILITY

QUESTIONS: 1. Is the Florida Council for the Blind liable in tort for the negligent operation of a privately owned car, operated by a member of the council on official business?

2. Is it liable in tort in the event of food poisoning or other injury that may result from the operation of vending stands in public buildings?

3. If it is, is it authorized to purchase insurance coverage for such contingencies?

To the Florida Council for the Blind, Tampa, Florida:

The legislature has not imposed liability upon you for tortious acts and absent such legislative provision the law is well settled that neither a state nor an agency thereof is liable for the tortious acts of its officers or employees. It may be of interest to you to know that even if you were authorized "to sue and be sued," such authorization would not impose any such liability upon you. (*Arundel Corporation v. Griffin*, 103 So. 422).

My answer to your first and second questions is negative.

Answering your third question, there being no liability on you for such torts, you are not authorized to purchase such insurance coverage.

DEPENDENT AND DELINQUENT CHILDREN

March 21, 1945.—045-81.

PROBATION OFFICERS—APPOINTMENT

QUESTION: Section 8, Chapter 19113, Acts of 1939, authorizes the judge of the juvenile court of Orange county, by and with the consent of the board of county commissioners, to appoint a probation officer to act for the juvenile court of Orange county.

Has the governor any discretion in connection with this appointment and if not, is it incumbent upon the governor to issue a formal commission to the probation officer appointed by the juvenile judge?

To Honorable Millard F. Caldwell, Governor:

Section 8, Chapter 19113, Acts of 1939, reads as follows:

"Section 8. The Judge of said Court is hereby authorized by and with the consent of the County Commissioners of Orange County, Florida, to appoint one or more probation officers who shall have and exercise the powers and duties conferred by law upon probation officers of Juvenile Courts; that each probation officer shall receive a salary not to exceed the sum of fifteen hundred (\$1,500.00) Dollars per annum, to be fixed by said county commissioners, and shall be paid in equal monthly installments out of the Fine and Forfeiture Fund of Orange County, Florida."

You will note that by this section it is provided that the judge of said court is authorized by and with the consent of the county commissioners of Orange county, Florida, to appoint one or more probation officers who shall have and exercise the powers and duties conferred by law upon probation officers of juvenile courts.

In the case of *State ex rel Gibbs, Attorney General v. Martens*, 141 Fla. 666, 193 So. 835, the Supreme Court of Florida decided in a case affecting Chapter 19002, Acts of 1939, that the provision for the appointment of a chief probation deputy and three assistants to be appointed by the judge of any juvenile court in counties of 180,000 population, were officers and not merely employees, and that under Article III, Section 27 of the constitution requiring that the legislature provide for election by the people or appointment by the governor of state and county officers not otherwise provided by the constitution, was unconstitutional.

A reading of Section 8, Chapter 19113, Acts of 1939, would seem to come within the ruling decided in the cited case as it purports to authorize the judge of the court with the consent of the county commissioners of Orange county, Florida, to appoint one or more probation officers who shall have and exercise the powers and duties conferred by law upon probation officers of juvenile courts.

There does not seem to be in the act any provision authorizing the governor to make such appointment in the event of invalidity of Section 8, or in the event of the happening of any other contingency, hence, it is my opinion that the governor has no authority to make the appointment and that the provisions in reference to said appointment, as contained in said Section 8, are unconstitutional and void because they do not provide for either election by the people or appointment by the governor, and because such probation officers are held in the case above cited to be state officers and not merely employees.

September 13, 1945.—045-286.

CHILD CONVICT—TRANSFER FROM PRISON TO INDUSTRIAL SCHOOL

QUESTION: Has the Board of Commissioners of State Institutions authority to transfer to the Florida Industrial School for Boys a boy, 14 years of age, sentenced by a circuit court to twenty years in the state prison for second degree murder?

To Honorable John T. Wigginton, Secretary, Board of Commissioners of State Institutions:

An examination of Chapter 955, Florida Statutes, 1941, discloses no provision authorizing the board to transfer a boy from the state prison to the industrial school under the circumstances presented by the above question. An examination of Chapter 415, particularly Section 415.21, 1943 Supplement to Florida Statutes, 1941, indicates that nothing therein is applicable to the stated circumstances here, said Section 415.21 being applicable before sentence of a child less than eighteen years of age.

It seems that Section 955.18, Florida Statutes, 1941, is the only law affording any possibility of relief. This section provides that when any child under eighteen years is sentenced by any court to the state prison, the pardoning board, upon application of such child, his parents or guardian, or other persons, may commute the punishment by substituting therefor the commitment of the child to the Florida Industrial School for Boys during such time as the pardoning board may deem proper, unless sooner discharged by the Board of Commissioners of State Institutions; and that if the child, after being sent to such institution, shall persist in a depraved course, or escape therefrom, the pardoning board may revoke such commutation and remand him to the state prison whence he came, to serve out his unexpired sentence.

In view of the foregoing, in my opinion the above question is properly answered, as follows:

The Board of Commissioners of State Institutions has no authority to effect transfer of a child convicted and sentenced under the circumstances related in the above question, from the state prison to the industrial school for boys, but if the pardoning board should see fit to commute this punishment and substitute therefor the commitment of such child to the boys' school, he could be received by our industrial school for boys and could be kept there for the time which the pardoning board might put in its commitment, or if in the discretion of the Board of Commissioners of State Institutions, after the boy had gone to the boys' school it found that he might be sooner released, this latter would be within the authority of the Board of Commissioners of State Institutions to order.

May 21, 1946.—046-216.

INDEFINITE COMMITMENT—MINOR—LEGAL DISCHARGE

QUESTION: When a boy is received at Florida Industrial School for Boys from a criminal court, and his commitment papers provide that he is committed thereto for a stated period "or until he is legally discharged therefrom," does such wording constitute an indefinite commitment, permitting detention of said boy in said institution beyond the period for which he was specifically committed thereto?

To Mr. Arthur G. Dozier, Superintendent, Florida Industrial School for Boys, Marianna, Florida:

Section 3 of Chapter 21895, Laws of Florida, Acts of 1943, is now incorporated in our statutes as Section 415.21, 1945 Supplement to Florida Statutes, 1941. This section provides in effect that when any child less than eighteen years of age is arrested and brought before a court, either before trial or after trial and conviction, but before sentence, the judge of said court may, in his discretion, deal with said child as a delinquent or dependent child, as in said law provided; or he may sentence said child to Florida Industrial School or to such other punishment provided by law for the same offense; that if to Florida Industrial School, the sentence shall be conditioned that if such person is not received or kept there for the terms of the sentence "unless sooner discharged by the Board of Commissioners of State Institutions," or if such child is found to be incorrigible or incapable of reformation, he shall then suffer such alternative punishment as the court may designate in such sentence.

Since the question above specifically mentions a boy committed to the institution by a "criminal court," it is assumed that the commitment referred to was issued in connection with the sentence of a boy to the institution by a criminal court under the authority of above Section 415.21, and this opinion is conditioned upon such assumption. It is here noted that on December 28, 1945, (our opinion No. 045-397), this office had occasion to discuss a certain feature of the form of commitment required

under such circumstances, copy of which opinion is hereto attached. It is recognized that more latitude is permitted under Section 415.20, Florida Statutes, 1941, as to commitment, detention and discharge of a child under eighteen dealt with as a delinquent child and, as indicated above, neither this opinion nor said opinion No. 045-397 is applicable in such instance.

Section 955.17, Florida Statutes, 1941, indicates that a boy committed to the institution shall be detained during the time for which he was committed "unless he is sooner discharged as reformed, or remanded to prison under the sentence of the court as incorrigible," under the circumstances provided in said section. Section 955.21, Florida Statutes, 1941, specifies that such a commitment shall be for such period "as the committing judge shall deem proper, or until he shall reach his majority, or unless discharged earlier by the board of commissioners of state institutions." Section 958.01, Florida Statutes, 1941, in the prescribed form of commitment to the institution, reasonably seems to contemplate that a boy shall be committed to the institution for a definite period or "until he is legally discharged therefrom." And attention is again directed to the above quoted provision of said Section 415.21 with respect to detention of a boy at said institution "unless sooner discharged by the Board of Commissioners of State Institutions." In view of the apparent intent and meaning of these sections, it would seem that the wording quoted from the prescribed form of commitment, "or until he is legally discharged therefrom," as applied to a boy sentenced by a criminal court under the provisions of said Section 415.21, contemplates the power of the Board of Commissioners of State Institutions to discharge the boy from said institution for any reason noted in said sections of our law. It appears that such wording in said prescribed form of commitment is not to be construed as permitting the authorities at the institution to detain a boy so committed by a criminal court beyond the period for which he was specifically committed to said institution.

In view of the foregoing, in my opinion the above question properly is answered as follows:

A boy committed to Florida Industrial School by a criminal court under a sentence conditioned and in the form provided in said Section 415.21, cannot properly be detained at such institution beyond the period for which the court specifically sentenced him thereto.

August 19, 1946.—046-351.

DELINQUENT MARRIED MINORS—DISABILITIES

QUESTION: Does the marriage of a minor under eighteen years of age result in the removal of the disabilities of such minor so as to take said minor from the jurisdiction of the juvenile court of Hillsborough county, when such minor is charged with a crime?

To Honorable Hugh Culbreath, Sheriff, Hillsborough County, Tampa, Florida:

"The weight of authority is that married infants are within the operation of the (Dependent and Delinquent Children) Statute," 43 C. J. S., p. 231, Infants, Paragraph 98, note 38. 19 A. L. R. Annotation page 616.

Our supreme court has not passed upon this question but in my opinion the majority rule is the correct and just one.

Chapter 415, Florida Statutes, 1941, as amended by the Laws of 1945, which has to do with our dependent and delinquent children under eighteen years of age, was passed for a distinct purpose and that was for the welfare of juvenile offenders, and to afford an opportunity to

them for reclamation and reform. It is remedial, not punitive. A careful reading of this chapter, I am sure, will disclose these purposes.

I am not unmindful of the fact that Sections 743.01, 743.02 and 743.03 have for their purpose the removal of disabilities of married minors. I do not feel that these last three sections were ever intended to remove such minors from the force and effect of our dependent and delinquent children's act (Chapter 415, Florida Statutes, 1941). As said by the Texas Court in the case of *Phillips v. State*, 20 S. W. 2d., page 790, text 792:

"The purposes of the Juvenile Court Law have a clear and distinct connection with age as related to discretion and character. In passing it, the legislature indulged the usual presumptions arising from human experience that there is ordinarily a lack of mature discretion, discriminating judgment, and stability of character in children under the age of eighteen years; hence it does not apply to all minor children, but only to 'all minor children under the age of eighteen years.'"

The Texas statute is similar to our Florida statute.

A married delinquent child under the age of eighteen years charged with a crime, in my opinion, has as much right to be reclaimed and reformed as an unmarried child of the same years and under the same circumstances. To hold otherwise would shock my sense of justice. I believe that the legislature intended that our dependent and delinquent children's act should apply to both such married and unmarried delinquent children.

Your question, therefore, is answered in the negative.

PLAYGROUND AND RECREATION CENTERS

July 9, 1945.—045-201.

See 045-152
Page 236.

DISBURSEMENT OF COUNTY FUNDS

QUESTION: May the board of county commissioners lawfully include in next year's budget one-third of the cost of erecting a bandstand, playground, and comfort station in a park which is jointly owned by the county and the city, and where the city will supply one-third of the cost and the remaining one-third will be supplied by popular subscription?

To Honorable Bryan Willis, State Auditor:

Chapter 418, Florida Statutes, 1941, authorizes cities, towns, and counties to establish, under certain conditions, playgrounds and recreation centers and to make appropriation for their conduct, equipment and maintenance from the general county or municipal fund.

The additional facts submitted require a modification of my opinion of June 25 as to the particular expenditure mentioned above. It is my opinion that when the county commissioners and the city authorities, following the requirements of Chapter 418, shall both, by proper resolutions, dedicate and set apart the park jointly owned by them, or an appropriate portion thereof, not dedicated to another or inconsistent public use, as a playground and recreation center under the joint control of the county and the city, the board of county commissioners may lawfully include in next year's budget one-third of the cost of the bandstand, comfort station, and playground equipment.

FLORIDA AGRICULTURAL AND INDUSTRIAL RELIEF COMMISSION

February 12, 1946,—046-53.

APPROPRIATION—PAYMENT

QUESTION: What is the proper manner of paying out the \$50,000 appropriation contained in Section 420.11, Florida Statutes, 1941, as amended by Chapter 22821, Laws of Florida, Acts of 1945?

To Honorable J. M. Lee, State Comptroller:

Since receiving your letter, an application was made to the supreme court by petition for clarification of their opinion rendered in the case of State of Florida v. Caldwell and others, as constituting the Florida State Improvement Commission, filed November 30, 1945, which dealt with the question propounded by your letter. On February 8, 1946, the supreme court handed down an additional opinion clarifying the opinion of November 30, 1945, in which additional opinion the court specifically sets out the manner in which the appropriation in Section 420.11, mentioned in your letter, should be paid out. We enclose herewith to you a copy of the court's clarification opinion.

The point having been passed upon by the supreme court in its opinion as aforesaid, we do not deem it necessary at this time that we render to you a formal opinion upon the question.

CHAPTER XXV

LABOR

WORKMEN'S COMPENSATION LAW

February 28, 1945.—045-59.

STATE ROAD DEPARTMENT

QUESTION: Where the State Road Department of Florida has employed a minor under 18 years of age and has failed to obtain an age certificate for employment purposes with respect to such minor as required by Section 450.04, 1943 Supplement to Florida Statutes, 1941, in event of injury of said minor in the course of such employment, is such minor entitled to double the amount of compensation as contemplated by Section 440.54, Florida Statutes, 1941?

To Honorable Raymond E. Barnes, Director, Workmen's Compensation Division, Florida Industrial Commission:

At the outset, it is assumed that the factual situation expressed in said question contemplates a minor over 16 years of age and under 18 years of age, and that such injury was sustained subsequent to June 10, 1943.

Section 440.54, Florida Statutes, 1941, provides, in effect, that compensation and death benefits as provided by the Workmen's Compensation Law shall be double the amount otherwise payable if the injured employee at the time of accident is a minor employed, permitted or suffered to work in violation of any of the provisions of the child labor laws of Florida; that for such increased compensation or benefits the employer alone and not the carrier is liable; and that any provision in an insurance policy undertaking to protect an employer from such increased liability shall be void. Section 450.04 (3), 1943 Supplement to Florida Statutes, 1941, provides, in effect that no minor between 16 and 18 years of age shall be employed in any gainful occupation unless the **person, firm, corporation, association, individual or partnership** employing such minor shall procure and keep on file an age certificate as provided in Section 232.08, Florida Statutes, 1941 (Emphasis supplied). Section 232.08 provides for issuance of "age certificates" for children who have reached 16 years of age.

If the excess compensation and benefits provided by Section 440.54 are not technically penalties, they partake of the nature of penalties. 3 Bl. Comm. 2; *Huntington vs. Attrill*, 36 L. Ed. 1123; *Forsyth vs. Central Foundry Co.*, (Ala.) 198 So. 706. Such excess amounts provided by the statute would seem to fall in the category of statutes allowing double damages, which are further characterized as "remedial" in nature. *Huntington vs. Attrill*, supra; *Dunbar vs. Jones*, (Conn.) 87 A. 787, 788.

Above Section 440.54 was originally Section 18 of Chapter 18413, Acts of 1937. Section 19 of such chapter (now Section 440.55, Florida Statutes, 1941), provides, in effect, that any person entitled to compensation benefits by reason of injury or death of an employee of the State of Florida, its boards, bureaus, departments, agencies or subdivisions, may maintain proceedings or actions at law against the state, its boards, etc., in the same manner as provided with respect to other employers. Chapter 18413 was amendatory of various parts of the Workmen's Compensation Law, and the title thereto included subject matter pertaining to such amendments as well as the consent of the state to be sued, as aforesaid.

Prior to including Section 19 of said Chapter 18413 into Florida Statutes, 1941, the act with respect to this consent of the state might have been questioned (see *State vs. Love*, 126 So. 374). However, it seems that by the adoption of Florida Statutes, 1941, this defect, or apparent defect, was cured. *Carlton vs. State*, 58 So. 486; *McConville vs. Ft. Pierce Bank & Trust Co.*, 135 So. 392.

Article III, Section 22, Florida Constitution, stipulates that provision may be made by general law for bringing suit against the state as to all "liabilities" now existing or hereafter originating. The grant of double compensation or benefits provided by Section 440.54 are payable upon violation of the provisions of the child labor laws of Florida. Such a violation invoking the excess compensation or benefits may be said to fall in that borderland between strictly civil rights and remedies and the realm of the criminal law. Laws providing penalties or "remedial" damages are strictly construed; and statutes granting the consent of the state to be sued are susceptible of strict construction.

This question could be settled definitely only by a court construction of Sections 440.54 and 440.55 and the related laws mentioned. However, in the absence of such court construction, the following conclusions appear to be reasonable:

(1) The term "liabilities" as used in Article III, Section 22, Florida Constitution is not to be construed to cover statutory penalties or excess damages in the nature of penalties payable as prescribed by Section 440.54.

(2) It would seem that the violation of a law of the state by officers or employees of the state properly may not be imputed to the state.

(3) The state is not a "person, firm, corporation, association, individual or partnership" as such terms are used in Section 450.04 (3), 1943 Supplement to Florida Statutes, 1941. (See "Definitions," Section 1.01, Florida Statutes, 1941).

For the reasons above stated, it is my opinion that the above question is properly answered in the negative.

February 27, 1945.—045-54.

CRIPPLED CHILDREN'S COMMISSION

QUESTIONS: 1. Does the Florida Crippled Children's Commission come under the Florida Workmen's Compensation Act?

2. Assuming that the notice required by Section 440.05, Florida Statutes, 1941, was not given, would the commission automatically come under the Workmen's Compensation Act and be subject to its provisions?

To the Florida Crippled Children's Commission:

Section 440.03 reads:

"Every employer and every employee, unless otherwise specifically provided, shall be presumed to have accepted the provisions of this chapter, respectively to pay and accept compensation for injury or death, arising out of and in the course of employment, and shall be bound thereby, unless he shall have given prior to the injury, notice to the contrary as provided in Sec. 440.05."

Section 440.02 (4) defines an employer as follows:

"The term 'employer' means the state and all political subdivisions thereof, all public and quasi-public corporations therein, every person carrying on any employment, and the legal representative of a deceased person or the receiver or trustees of any person."

The Florida Crippled Children's Commission is a public corporation and therefore an employer within the above definition. This requires an affirmative answer to the first question.

Under Section 440.03, an employer automatically comes under the provisions of the act by failure to give notice required by Section 440.05, and your second question is also answered in the affirmative.

May 8, 1946.—046-195.

QUALIFIED PHYSICIAN OR SURGEON—CHIROPRACTOR

QUESTION: The usual health and accident policies issued by insurers in Florida provide, among other conditions, that benefits, in accordance with their terms, are payable thereunder during the period when "the insured requires and receives the personal treatment of a **qualified physician or surgeon**," or when "the insured is under the personal care of a **legally qualified physician or surgeon**." If an insured is treated by a chiropractor for injury or disease, would the conditions expressed in the quoted clauses be met?

To Honorable J. Edwin Larson, Insurance Commissioner:

This office had occasion on March 25, 1941, to construe wording in a part of our Workmen's Compensation Law which is very similar to the wording underscored in the above question. That opinion was our No. 041-166, and it held that, under the conditions expressed therein, a chiropractor was a "qualified physician or surgeon" as such words are used in the initial sentence of what is now Section 440.13(1), 1945 Supplement to Florida Statutes, 1941, quoted in part as follows:

"The employer shall furnish such medical, surgical, and other attendance or remedial treatment under the direction and supervision of a **qualified physician or surgeon**, etc."

The argument might well be made that the reasoning found in construing such words in said law is applicable to the construction of such words in a contract. However, the argument may not be employed safely as the basis for an opinion in the latter instance, for the reasons set forth below.

The question in said Opinion No. 041-166 dealt with the propriety, under the law, of payment of fees to chiropractors for professional services rendered employees under the circumstances set forth in said Section 440.13(1). The question here seeks to elicit an opinion involving construction of important clauses used in subsisting contracts between insurance companies and their insureds in Florida. The question is, obviously, most controversial. For example, see authorities in our aforesaid opinion No. 041-166, and also the findings of courts of other state in *Erdman vs. Great Northern Life Ins. Co.* (Mich.), 235 N. W. 260; *Isaacson vs. Wisconsin Casualty Ass'n* (Wis.), 203 N. W. 918; *New York Life Ins. Co. vs. Madzelewski* (Mich.), 255 N. W. 299. Doubt with respect to this question shall exist until our courts are called upon to construe such contract provisions in an appropriate case.

It is apparent that any opinion of this office with respect to the above inquiry would not settle the question. Furthermore, under the circumstances it would not be appropriate for this office to attempt to state a rule of construction for these contract provisions involving, as they do conditions required to be met by the insureds before benefits are payable under policies wherein such clauses are used.

UNEMPLOYMENT COMPENSATION LAW

June 18, 1946.—046-270.

VETERANS—MERIT EXAMINATIONS—CREDITS

QUESTIONS: (1) Is it the intent of Chapter 23015, Laws of Florida, Acts of 1945, that the preference to the class of persons described therein of the ten points in addition to their rating earned, as therein provided, shall inure to the benefit of any such person whose earned grade on a merit system examination is less than the passing grade of 70%?

(2) Do the descriptive words in Section 1 of said Chapter 23015, "all persons possessing honorable discharges from the military forces of the United States," describe a class limited to "war veterans"?

(3) Is a person eligible for employment by Florida Industrial Commission under amended Section 443.12 (4), 1945 Supplement to Florida Statutes 1941, who is otherwise qualified, entitled to the preference granted by said Chapter 23015 and, hence, has been a bona fide resident of Florida for at least three years, if such person has not been a resident of the state for the last five years, as contemplated by said amended Section 443.12 (4)?

To Mr. Mac G. Grigsby, Merit System Supervisor, Gainesville, Florida:

It is the general rule that statutes which give war veterans a preference in the matter of civil service appointments are valid where the effect thereof is not to place in a public position a person not qualified to discharge the duties thereof. It seems that additional credits may be granted a veteran who has passed a civil service examination. Grave doubt exists, however, that such a law is valid if it favors veterans by granting them credits in advance of examination or fixes a lower passing grade for such a class. The underlying principle found in cases involving such laws seems to be that the veteran must possess at least the minimum requirements to perform the duty involved, and that a disregard of this principle results in a classification which offends constitutional equal protection clauses. Section 1, Declaration of Rights, Florida Constitution; *Com. ex rel Graham vs. Schmid* (Pa.) 3 A (2d) 701; *State ex rel King vs. Emmons* (Ohio), 190 N. E. 468; *State ex rel Schmidt vs. Horter* (Ohio), 183 N. W. 839; *State ex rel Boyd vs. Matson* (Minn.), 193 N. W. 30; *Kangas vs. McDonald* (Minn.) 246 N. W. 900; *Jones vs. O'Toole* (Col.) 212 P. 9; *Cook vs. Mason* (Col.) 283 P. 691. In view of these apparently recognized principles, and the purposes of our merit system in Florida, it is not believed it was the legislative intent by Chapter 23015 to grant, in effect, to a war veteran a passing grade of 60% as against a passing grade of 70% prescribed as the minimum required of others to qualify.

It is observed that "war veterans," as used in the title of said Chapter 23015, are included in the descriptive words "all persons possessing honorable discharges from the military forces," etc., as expressed in the body of the act, but it is to be recognized that many persons included in the latter class are not included in the former. It requires no authority to support the statement that the title of an act must describe or reasonably place one on inquiry with respect to that which is in the body of an act. The title of an act may be so restrictive as to confine the body thereof to the phase of the subject indicated by the title. *Florida Trust Co., vs. Miami Coliseum Corp.* (Fla.), 133 So. 334. If that part of a statute, the subject of which is not expressed in the title, can be separated from the rest, it may be declared void, the rest being permitted to stand as valid. *State ex rel. Gonzales vs. Palmes* (Fla.), 3 So. 171. Additional authorities could be cited in support of these general principles. In view of the apparent failure of the title of said Chapter 23015 to thus meet the requirement imposed by Article III, Section 16, Florida Constitution, one of two eventualities apparently would most likely result from

a court test of this feature of the act, viz., (1) that the act is unconstitutional, or (2) that the act is valid to the extent limited in its restrictive title. Since, except under certain circumstances not here found, it is not considered the proper province of this office to urge the unconstitutionality of legislation in the absence of court adjudication, it would seem that we should adhere to the second probable eventuality named.

The benefits of said Chapter 23015 are granted to those persons described therein who have been "bona fide residents" of this state for three or more years. Section 443.12 (4), 1945 Supplement to Florida Statutes 1941, (a part of Chapter 22832, Laws of Florida, Acts of 1945) provides that no persons shall be employed by Florida Industrial Commission to fill the positions and perform the duties contemplated by said section who have not been residents of the state "for the last five years immediately preceding his employment." It is to be noted that this mentioned provision of said Section 443.12 (4) restated a similar provision of the original section it amended. The residence feature of said Chapter 23015 would not seem to be in conflict with the five year residence provision of said Section 443.12 (4), and it appears reasonable to construe the former in recognition of the residence requirements of the latter. In further support of this position, it is remarked that both Chapters 23015 and 22832 became laws on the same day—June 11, 1945.

In view of the foregoing, it appears that the above questions are answered in their numbered order as follows:

(1) The preference of ten points in addition to rating earned, granted to the persons described in said chapter 23015, inures to the benefit only of such a person whose earned grade on a merit system examination is 70% or better.

(2) The wording "all persons possessing honorable discharge from the military forces of the United States," as used in Section 1 of said Chapter 23015, is construed to describe and include only "war veterans."

(3) A person otherwise eligible must not be employed by Florida Industrial Commission, under the provisions of said Section 443.12 (4), unless such person has been a resident of the state for the last five years immediately preceding his employment. This provision of law is applicable to the merit system personnel of the unemployment compensation division of the commission. It will also be applicable to the merit system personnel of the unemployment service division if and when that service is returned to state operation from the federal agency now functioning in that field.

September 5, 1945.—045-279.

PROPOSED FEDERAL BILL—EFFECT ON RIGHTS OF CLAIMANTS

QUESTIONS: 1. Can the State of Florida enter into an agreement with the Federal Government, as contemplated by proposed Federal Bill S1274, without said agreement resulting in state benefit payments being partially or totally reduced by the amount of supplementary federal payments therein provided?

2. If the State of Florida does not enter into such a voluntary agreement, would the federal supplementary payments result in the reduction of the amount payable under the state law?

To Honorable Millard F. Caldwell, Governor:

Without going into detail as to other features of the proposed bill, it appears that S1274 as applied to the Florida Unemployment Compensation Law is intended to supplement compensation benefits under our law to the extent set forth below, extend the duration of the benefit payments to 26 weeks, and provide coverage for certain classes of employees not now covered by our law—that is to say, government employees,

maritime workers and certain classes of employees engaged in the handling of agricultural products.

Under our laws, in accordance with the formula for calculating the amount of weekly benefits as set forth in Section 443.04, Florida Statutes, 1941, the maximum weekly benefit anyone can receive is \$15 and the maximum duration of such benefit payments is 16 weeks. As I understand the meaning of S1274, it contemplates supplementing unemployment compensation benefits to those who would receive more than the Florida law allows if the formula set forth in said Section 443.04 were extended so that the weekly benefit amount would finally reach the sum of \$25, with other optional features and the extending of the duration period as noted.

A further provision of Bill S1274 is to the effect that should the state enter the agreement with the Federal Government as contemplated by said bill, the agreement shall contain a provision that no claimant shall have his benefits under the Florida law impaired by virtue of any supplementary benefits he might receive under the proposed bill.

I understand further from the reading of this proposed federal law that if the state and the Federal Government cannot enter into a voluntary agreement about the use of federal funds to supplement state payments, then the Federal Government can make such supplementary payments directly.

The only provision I can find in the Florida law which could be construed as a possible lack of authority for one receiving benefits under the Florida law to receive such supplementary sums directly or indirectly from the Federal Government is found in Section 443.06 (5), which provides in part as follows:

"An individual shall be disqualified for benefits . . . (5) For any week with respect to which or a part of which he has received or is seeking unemployment benefits under an unemployment compensation law of another state or of the United States";

It may be that this provision is intended to refer and apply to a separate and distinct system or agency for payment of benefits and does not apply to supplementary funds as contemplated by proposed Bill S1274. However, our courts have never construed this provision of law.

It is called to your attention that I do not herein give you my opinion as to the constitutional authority of Florida to enter into an agreement with the Federal Government which would, to the extent contemplated by Bill S1274, make Florida subservient and subject to a federal agency in the administration of our Unemployment Compensation Law. Neither do I give my opinion as to the constitutional authority of the Federal Government to assume, to the extent and as contemplated by Bill S1274, to enter the field of unemployment compensation insurance as related to Florida and its citizens and to prescribe benefits or assume control in such field at the expense of Florida's authority and control. Nor do I give my opinion as to the constitutional authority of the Federal Government to prescribe for the payment of benefits to employees in Florida who are not covered by the Florida Unemployment Compensation Law and to provide for the payment of benefits to such employees through our appropriate Florida agency or directly to such employees. I merely mention these questions which have occurred to me in consideration of the provisions of proposed Bill S1274 as related to Florida, our Unemployment Compensation Law and the citizens of Florida.

In view of the foregoing, it seems the above questions are properly answered as follows:

In view of the provisions of Section 443.06 (5), Florida Statutes, 1941, there is the possibility that a claimant under the Florida law would be totally disqualified to receive benefits under such law were he to seek

or receive benefits under the proposed Federal Bill S1274. It is further remarked that the provisions of said Section 443.06 (5) raise doubts as to the authority of the state to enter into an agreement with the Federal Government to the effect that no claimant should have his rights to benefits under the Florida law impaired or affected by receipt of any supplementary benefits under Bill S1274.

September 5, 1945.—045-282.

**FLORIDA INDUSTRIAL COMMISSION—ISSUANCE OF TAX
WARRANT**

QUESTIONS: 1. Is it mandatory that the sheriff execute an attachment for the Florida Industrial Commission without orders from his circuit court?

2. Does the sheriff have a right to refuse to execute such orders without their having first gone through due process to obtain a circuit court order?

(This is referring to a tax warrant against a certain person for workmen's compensation).

To Honorable Willis V. McCall, Sheriff, Lake County, Tavares, Florida:

I assume that you refer to the warrant issued by the Florida Industrial Commission by virtue of Section 443.15, Florida Statutes, 1941 (Chapter 21982, Laws of Florida, 1943), and that the same was issued for contributions for unpaid unemployment compensation.

I further assume that the warrant is a legal one.

Section 443.15, Florida Statutes, 1941, Section 3, subparagraphs 1 (a) and 2, creates a lien in favor of the commission upon all the property, both real and personal, of any employer who shall become liable for the payment to the Unemployment Fund levied and imposed and payable under the provisions of the act; and that the commission may issue a warrant under its official seal and signed by the chairman, directed to "All and Singular the Sheriffs of the State of Florida" commanding them to levy upon and sell the property of such an employer liable under the law for the payment of said warrant and that the sheriff should proceed upon said warrant in all respects with like effect and in the same manner prescribed by law in respect to executions issued out of the office of the clerk of the circuit court upon judgments of the circuit court.

In discussing such a warrant, in an opinion which I rendered on August 20, 1942, I stated:

"Neither the circuit court nor the clerk thereof has any affirmative acts to perform in order to lend efficacy to such warrant or the levy made pursuant thereto."

It is, therefore, my opinion that your first question should be answered in the affirmative and your second question answered in the negative.

In rendering this opinion I do not pass upon the constitutionality of the law involved.

June 19, 1945.—045-149.

DISQUALIFICATION FOR BENEFITS

QUESTIONS: 1. Should a claimant for benefits under the Unemployment Compensation Law of Florida who was separated from employment in February, 1945, because delinquent in labor union dues, he having been a member of such union since September, 1943, be subjected to any disqualification with respect to benefits under said law on the theory that he has been guilty of misconduct or on the theory that he has vol-

untararily quit his work, as contemplated by Section 443.06 (1), Florida Statutes, 1941, as amended, in an instance wherein claimant's employer and such labor union were operating under a collective bargaining agreement with closed shop provisions entered into July, 1941, and in force and effect at the time such claimant's employment was terminated?

2. If a claimant for benefits under the Unemployment Compensation Law of Florida, not a member of a labor union, should refuse an offer to work for an employer who has a collective bargaining agreement with a labor union, which agreement has closed shop provisions, because under such agreement the claimant would be required to join such union to be eligible to work for such employer, would it be appropriate to disqualify such claimant under provisions of Section 443.06 (2), Florida Statutes, 1941, as amended?

To Honorable C. B. Smith, Chairman, Florida Industrial Commission:

At the general election in 1944, the people of Florida adopted the Right-to-Work Amendment (being an addition to Section 12, Declaration of Rights, Florida Constitution), which provides as follows:

"The right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer."

Prior to the adoption of this amendment closed shop provisions in a collective bargaining agreement duly entered into and existing between a collective bargaining unit and an employer were not considered contrary to public policy, since no controlling state statute existed. *International Association of Machinists vs. State of Florida*, 15 So. 2d. 485. By adoption of the amendment, however, the people of Florida have declared that membership in a labor union as a prerequisite to the right to work is contrary to public policy; and that has been the express public policy of Florida since the adoption of the amendment.

In the case of *American Federation of Labor, et al. vs. Watson*, as Attorney General, et al., pending in the United States District Court for the Southern District of Florida, Tampa Division, the validity of the amendment was attacked on grounds which are generally stated as follows: (1) That the amendment violated certain provisions of the federal constitution; (2) That the amendment was an unlawful exercise of the police powers of the state; and (3) That the amendment was in conflict with provisions of certain federal statutes enacted within the power delegated to congress. On June 11, 1945, a three-judge court composed of Circuit Judge Waller and District Judges DeVane and Barker found the amendment valid as against such attacks in the aforesaid case. The citation of authorities appearing in the opinion in such case and other authorities on the points raised would seem unnecessary.

In view of the foregoing, in my opinion the above questions are properly answered in their numbered order as follows:

1. The Right-to-Work Amendment has declared that membership in a labor union as a prerequisite to employment is against public policy. The validity of such amendment has been sustained, as aforesaid. Hence, it would seem reasonable that an employee whose employment has been terminated under the factual situation set forth in this question cannot be said to have been guilty of misconduct with respect to such employment, or to have left his employment voluntarily without good cause, within the meaning of Section 443.06 (1), Florida Statutes, 1941, as amended.

2. Since the Right-to-Work Amendment has established that membership in a labor union as a prerequisite to employment is contrary to

public policy, and since such amendment has been sustained by the court, as aforesaid, it would seem that a claimant for benefits under the Unemployment Compensation Law would not be disqualified under provisions of Section 443.06 (2), Florida Statutes, 1941, as amended, to receive such benefits if he refused an offer to work for an employer who has a collective bargaining agreement with a labor union, such agreement having closed-shop provisions which would require the claimant to join such union to be eligible to work for said employer.

CHILD LABOR

March 22, 1945.—045-74.

MINOR UNDER SIXTEEN—MAXIMUM NUMBER OF WORKING HOURS

QUESTION: In determining the maximum 40-hour week permitted a minor under sixteen years of age engaged in a gainful occupation, as set forth by Section 450.05, Florida Statutes, 1941, must hours in school be counted in arriving at such maximum figures?

To Mr. David Lang, Senior Accountant, Workmen's Compensation Division, Florida Industrial Commission:

The features of Section 450.05 pertinent to the above question are that minors under sixteen years of age shall not be employed, permitted or suffered to work in any gainful occupation (1) for more than six consecutive days in any one week; (2) for more than forty hours in any one week; (3) for more than eight hours in any one day; and (4) that on any day when school is in session the hours of work when combined with hours in school shall not exceed a total of eight hours.

This is a Child Welfare Law, and it should be construed with the reason for its enactment in mind. Since the law provides that on any day when school is in session the hours in school and the hours employed, with respect to such minor, must not exceed eight hours, it seems to have been the legislative intent that with respect to such a minor, hours in school and hours in employment should be considered together in arriving at the forty-hour maximum in any one week.

In view of this conclusion reached, it is my opinion that the above question should be answered in the affirmative, i. e., that the forty-hour limit for any one week is reached when the hours in school and the hours employed equal that figure.

CHAPTER XXVI

PROFESSIONS AND VOCATIONS

BASIC SCIENCE LAW

June 24, 1946.—046-273.

NATUROPATHY—LICENSE TO PRACTICE

QUESTIONS: 1. Is it a prerequisite to taking an examination for a license to practice naturopathy that the applicant present to the State Board of Naturopathic Examiners a certificate of his proficiency in the basic sciences?

2. If the first question is answered in the affirmative, is the State Board of Naturopathic Examiners authorized to examine the applicant in the basic sciences of anatomy, physiology, pathology and chemistry, in which he has obtained a certificate of proficiency from the Board of Examiners in the Basic Sciences?

To Honorable Roy B. Walsingham, N. D. Secretary-Treasurer, State Board of Naturopathic Examiners, Tampa, Florida:

I shall consider the two questions separately.

1. Section 456.02, Florida Statutes, 1941, defines the term "Basic Sciences" as meaning the subjects of anatomy, physiology, chemistry, pathology and bacteriology. Section 456.03 provides that:

"No person shall be eligible for examination for a license to practice the healing art or any branch thereof or be granted any such license unless and until he has presented to the licensing board or other authority empowered to issue such license, a certificate of proficiency in the basic sciences as provided in this chapter. This requirement shall be in addition to all other requirements now or hereafter in effect with respect to the issuance of such license."

It is recognized that naturopathy is one of the healing arts (State ex rel. Turner v. Baltzell, 144 Fla. 278, 197 So. 783); so, standing alone, there can be no doubt that the quoted section requires an applicant to present a certificate of proficiency in the basic sciences to the State Board of Naturopathic Examiners as a prerequisite to his taking an examination for a license to practice naturopathy.

However, you have raised the question whether Section 462.21, 1943 Supplement to Florida Statutes, 1941 (Section 7, Chapter 21707, Laws of 1943), has the effect of relieving applicants for examination before the State Board of Naturopathic Examiners of the necessity of presenting to that board certificates of proficiency in the basic sciences, as is provided by Section 456.03 quoted above. The section referred to by you, which is amendatory of the Naturopathy Law, provides as follows:

"Nothing in this chapter shall be construed or interpreted as changing, modifying or repealing any of the provisions of Chapter 456, 'Florida Basic Science Law,' and the provisions of said chapter and the provisions of this law shall be construed, interpreted, considered and enforced as separate laws, and independent each of the other."

This section specifically provides that nothing in the chapter of which it is a part shall be construed as changing, modifying or repealing any of the provisions of the Basic Science Law, so I think it is clear that it does not affect the requirement that an applicant present to the State Board of Naturopathic Examiners a certificate of proficiency in the basic sciences as a prerequisite to his taking an examination for a license to practice naturopathy. Therefore, it is my opinion that your first question should be answered in the affirmative.

2. Section 456.05, Florida Statutes, 1941, which is a portion of the Basic Science Law originally enacted as Section 23, Chapter 19281, Laws of 1939, provides, in part, that:

"... any board authorized to issue licenses to practice the healing art, or any branch thereof, shall accept certificates of proficiency issued by the Florida board of examiners in the basic sciences in lieu of examining applicants in such sciences."

As stated above, four of the basic sciences are defined as being anatomy, physiology, chemistry and pathology. The problem which presents itself is whether the portion of Section 456.05 above quoted denies to the State Board of Naturopathic Examiners the authority to examine applicants in those four sciences when the applicants possess certificates of proficiency in such subjects issued by the Board of Examiners in the Basic Sciences, despite the provisions of Section 462.05, as amended. In its original form, one of the provisions of Section 462.05 was to the effect that the State Board of Naturopathic Examiners should examine applicants in various enumerated subjects, including anatomy, physiology, chemistry and pathology, and this feature of the section was re-enacted by Chapter 21707, Laws of 1943.

It seems clear that prior to the enactment of Chapter 21707 it was the intention of the legislature, as expressed in Section 456.05, that certificates of proficiency in anatomy, physiology, chemistry and pathology issued by the Board of Examiners in the Basic Sciences must be accepted by the Board of Naturopathic Examiners in lieu of its examining applicants in such sciences. The contrary, and highly unreasonable, interpretation would be that a person must obtain a certificate of proficiency in those four basic sciences from the Board of Examiners in the Basic Sciences in order to qualify himself for examination upon the same four subjects by the State Board of Naturopathic Examiners.

I think it is equally clear that this legislative intent was not altered through the enactment of Chapter 21707, Laws of 1943 for, as was pointed out in the discussion of question number 1, Section 7 of that act specifically provides that nothing in the chapter of which it is a part shall be construed as changing, modifying or repealing any of the provisions of the Basic Science Law, and, Section 456.05, requiring boards authorized to issue licenses to practice the healing art to accept certificates of proficiency in the basic sciences in lieu of examining applicants in such sciences, was then and is now a part of the Basic Science Law.

Therefore, it is my opinion that the second question should be answered in the negative.

September 26, 1946.—046-422.

METASCIENCE—CERTIFICATE OF PROFICIENCY

QUESTIONS: 1. In order for one to practice metascience is it necessary that a certificate of proficiency in the basic sciences be obtained from the State Board of Examiners in the Basic Sciences?

2. In order for one to practice metascience, is it necessary that a license be obtained from the State Board of Medical Examiners?

To Honorable J. M. Lee, State Comptroller:

I find some difficulty in answering these questions because of my meager information as to the nature of the system of healing described as "metascience." It is obviously a coined word and does not appear in any standard dictionary. Of necessity, therefore, my conclusions are predicated upon the letter from a school of metascience to a prospective correspondence course student which you enclosed with your request. I quote below a number of excerpts from that letter.

The letterhead describes metascience as "the classic of the healing art." In the body of the letter are the following statements: "It is impossible to explain how the treatment is given except by teaching you"; "while the treatment is metaphysical, it is not a mental treatment"; "there is but one disease which may manifest in a thousand different ways with a name for each manifestation"; "metascience treats the cause of disease and not the effects, as is the procedure of other therapies"; "metascience treatments revitalize the cells of the body, the organs of the body and the blood stream with that vital life force which is the one essential to health, strength and life itself"; "we know of no disease that cannot be overcome with metascience treatments properly administered"; "we believe that you now know whether or not you want to learn a therapy that is unquestionably superior to any other therapy in the control of disease"; "twenty-six easy weekly lessons comprise the entire course."

Based upon the foregoing quotations and the entire letter from which they were taken, it is my opinion that your questions are properly answerable as follows:

1. The system of therapy known as metascience falls within the following definition of the healing art appearing in Section 456.02, Florida Statutes, 1941:

"The healing art includes any system, treatment, operation, diagnosis, prescription or practice for the ascertainment, cure, relief, palliation, adjustment or correction of any human disease, ailment, deformity, injury, or unhealthy or abnormal physical or mental condition."

Section 456.03 provides that no person shall be granted any license to practice the healing art or any branch thereof unless he has presented to the licensing board, or other authority empowered to issue such license, a certificate of proficiency in the basic sciences issued by the State Board of Examiners in the Basic Sciences, and Section 456.22 declares it to be a misdemeanor for anyone to practice the healing art without first having obtained a certificate of proficiency in the basic sciences. Section 456.04 excepts several specific classes of practitioners from the operation of the Basic Science Law, but none of these excepted categories is sufficiently broad to include practitioners of metascience.

For these reasons I think the first question should be answered in the affirmative.

2. In defining the practice of medicine, Section 458.13, Florida Statutes, 1941, provides that, "a person is practicing medicine within the meaning of this chapter * * * who shall offer or undertake by any means or method to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition." The section also makes a number of exceptions but none of those is applicable here. Section 458.05 declares that it shall be unlawful for any person to practice medicine without first having obtained a license from the State Board of Medical Examiners.

Although I am unaware of the exact methods employed in the practice of metascience, it seems clear that it is a system of treating human disease and that a practitioner of that system is engaged in the practice

of medicine within the definition of Section 458.13 referred to above. Therefore, I think the second question should be answered in the affirmative.

MIDWIFERY

August 7, 1945.—045-228.

REGULATION OF PRACTICE

QUESTIONS: 1. Is Chapter 14760 of the General Laws of Florida, 1931, still in effect and have there been any modifications or changes in that chapter since 1931?

2. Inasmuch as the regulation of the practice of midwifery is included in Chapter 20 of the sanitary code which has been established in accordance with Chapter 19366 of the General Laws of Florida, 1939, does the penalty provided under Section 10 of the above-captioned chapter apply to unlicensed midwives?

To Dr. Lucille J. Marsh, Director, Maternal and Child Health, State Board of Health, Jacksonville, Florida:

1. The above chapter has been brought into our compiled statutes and will be found numbered Sections 457.01 to 457.08, both inclusive. Florida Statutes, 1941.

2. Chapter 19366 of the General Laws of Florida, 1939, has been brought forward into Florida Statutes, 1941, and is numbered Sections 381.49 to 381.58, both inclusive.

I am not familiar with Chapter 20 of the sanitary code, but I assume from your question that the State Board of Health promulgated certain rules and regulations providing for the practice of midwifery. If a person has acted as a midwife and held herself out as such and has violated the rules and regulations of said sanitary code, and these rules and regulations are reasonable and lawful, in my opinion, she would be amendable to such rules and regulations, regardless of whether she was licensed or unlicensed.

If she has also violated the law by practicing midwifery without complying with Section 457.01, there is provided a penalty for this violation by Section 457.09, Florida Statutes, 1941. I trust that this answers your question.

PHYSICIANS

September 25, 1946.—046-421.

TEMPORARY LICENSE—EFFECT

QUESTIONS: 1. Is it a prerequisite to obtaining a temporary license to practice medicine that the applicant present to the State Board of Medical Examiners a certificate of proficiency in the basic sciences issued by the Board of Examiners in the Basic Sciences?

2. Are the proper officers of the State Board of Medical Examiners empowered to issue a temporary license which restricts the license to practice within a certain area?

To Honorable Harold D. Van Schaick, M. D., Secretary, State Board of Medical Examiners, Miami, Florida:

1. Section 458.07, Florida Statutes, 1941, is primarily designed to enable candidates for permanent licenses to obtain temporary licenses in order that they may practice their profession during the interim between making application for such permanent licenses and successfully standing examinations before the board of medical examiners. This section

provides that a temporary license to practice medicine "shall have the same force and effect of a permanent license until the next regular meeting of the board." Therefore, while a temporary license is in effect, its holder is endowed with all the rights and privileges which are enjoyed by one possessing a permanent license. By the same token, the obligations and responsibilities to the public of holders of the two types of licenses are identical, so it must be assumed that the legislature intended there should be no substantial difference between the qualifications necessary for a permanent license and those for a temporary one.

One of the most important requirements of one seeking to practice medicine is that he shall be learned and skilled in the basic sciences of anatomy, physiology, chemistry, pathology and bacteriology. This knowledge and skill are equally as necessary in one practicing under a temporary license as in one practicing under a permanent license. Section 456.03, Florida Statutes, 1941, provides that no person shall be granted any license to practice the healing art unless he has presented to the licensing board a certificate of proficiency in the basic sciences, and Section 456.22 declares it to be a misdemeanor for anyone to practice the healing art without first having obtained a certificate of proficiency in the basic sciences.

In the light of the foregoing, it is my opinion that the difference between a temporary and a permanent license to practice medicine is not one of kind but merely one of duration and that practicing medicine under a temporary license constitutes practicing the healing art within the purview of the Basic Science Law; so the first question should be answered in the affirmative.

2. This question has been partially answered above. Regulation of the practice of medicine is purely statutory and the State Board of Medical Examiners possesses only those powers which have been granted to it by the legislature. In empowering that board to issue permanent licenses the legislature has not provided that such licenses may be restricted in their territorial scope. It is true that Section 458.06 requires that the permanent license be recorded in the county in which the licensee resides or intends to practice, but this requirement does not diminish the state-wide operation of the license itself.

As pointed out above, Section 458.07 provides that until the next regular meeting of the board a temporary license shall have the same force and effect as a permanent license. That being true, the former must be as free from limitations as the latter, except for its period of effectiveness. Therefore, it is my opinion that the second question should be answered in the negative.

May 13, 1946.—046-209.

DOCTOR—USE OF NAME IN TRADE

QUESTION: Dr. P. Phillips Canning Company, a Delaware Corporation authorized to do business in this state, with executive offices in Orlando, Florida, is engaged in the production and marketing of canned citrus juices, grapefruit and citrus salad, under the trade name "Dr. Phillips," which trade name appears to be registered in the U. S. patent office. It appears that Dr. P. Phillips, of Orlando, Florida, is the president and a director of said company, and according to the records of the State Board of Health there is no one by that name authorized to practice any of the healing arts in Florida. Is there any law of Florida which forbids the use of the title "doctor" under the circumstances above set forth?

To Mr. H. M. Doss, Director, State Bureau of Narcotics, Florida State Board of Health, Jacksonville, Florida:

Section 458.15(2)(c), Florida Statutes, 1941, originally adopted and found in Chapter 12285, Laws of Florida, Acts of 1927, provides as follows:

That it shall be unlawful for any person "to use the title 'doctor' or any abbreviation thereof in connection with his name, or with any trade name in the conduct of any occupation or profession, involving or pertaining to the public health, or the diagnosis or treatment of any human disease, pain, injury, deformity or physical condition, unless duly licensed by a board created under the laws of the State of Florida."

We appear to have no other law of this state bearing upon the subject.

It is not felt that the production of a food product such as canned citrus juices or products is an "occupation . . . involving or pertaining to the public health" within the meaning of such words as they are used in the section of law quoted in the above paragraph. Hence, it is my opinion that the use of the title "doctor" in the above trade name and corporate name does not offend any law of Florida.

OSTEOPATHS

May 22, 1945.—045-120.

EDUCATIONAL PROGRAM REQUIREMENT FOR RENEWAL OF LICENSES—EQUIVALENT

QUESTION: In view of the federal ruling against holding conventions, how can the board comply with Section 459.19, Florida Statutes, 1941, as to the two-day educational program, in the matter of renewal of licenses?

To Dr. Richard S. Berry, Secretary-Treasurer, State Board of Osteopathic Medical Examiners, St. Petersburg, Florida:

Section 459.19, Florida Statutes, 1941, relating to the requirements for annual renewal of licenses by practitioners of osteopathic medicine and surgery, reads in part, as follows:

" . . . in addition to the payment of such renewal fee, each licensee so applying for his or her license renewal shall furnish to said board satisfactory evidence that, in the year preceding each such application for such renewal, he or she has attended the two-day educational program as promulgated and conducted by the Florida Association of Osteopathic Medical Physicians and Surgeons . . . or, as a substitute therefor, the equivalent of said program as approved by said board"

It will be observed that the statute permits the board to adopt and approve a substitute for the usual educational program, which substitute shall be, in the opinion of the board, the equivalent of the educational program. If a substitute is adopted, it should be one which is the best that can be devised as an equivalent of the usual educational program, taking into consideration the purposes of the said program. The fact that the substitute may not be in all respects as satisfactory as the two-day educational program would not invalidate it. Whatever is substituted should be something with which the applicants can comply, and fair and reasonable under all the circumstances.

June 11, 1945.—045-144.

LICENSE TO PRACTICE OSTEOPATHIC MEDICINE AND SURGERY—SUSPENSION

QUESTION: What is the proper procedure to be followed by the State Board of Osteopathic Medical Examiners in suspending a license to a practitioner of osteopathic medicine and surgery for nonpayment of renewal fee or for failure to furnish satisfactory evidence of attendance on the annual educational program?

To Dr. Richard S. Berry, Secretary-Treasurer, State Board of Osteopathic Medical Examiners, St. Petersburg, Florida:

Section 459.19 requires payment of a license renewal fee of \$5.00 on or before January 1 of each year, and also requires that such practitioner shall at the same time furnish the board with satisfactory evidence that in the preceding year he has attended the two-day educational program conducted by the Florida Association of Osteopathic Medical Physicians and Surgeons, or a substitute for the latter which may have been approved by the board. This section also requires the secretary of the board to send written notice of the foregoing requirements at least thirty days prior to January 1 to every person holding such a license, directed to the last known address of such licensee, enclosing a proper blank form for the application for renewal.

Section 459.20 provides that every person failing to renew his license within thirty days after the fee in connection therewith is due and payable shall have his license suspended.

Proper procedure for suspension of such a practitioner for non-compliance with either, or both, of the two requirements mentioned in Section 459.19 would be as follows: The board should adopt a resolution in which there should be included a finding (1) that the secretary of the board sent notice of renewal requirements with proper form for application for renewal of license to the person at his last known address at least thirty days prior to January 1, and (2) that he has failed to pay the renewal fee of \$5.00 or has failed to supply the board with satisfactory evidence of attendance on the two-day educational program as promulgated and conducted by the Florida Association of Osteopathic Medical Physicians and Surgeons (or the equivalent of said program as approved by said board), either, or both, as the case may be. The resolution should then suspend the person for noncompliance with one or the other, or both, of the requirements. Your attorney will know how to prepare such resolution.

While the statute states that "no further written notice thereof should be given," I think notice should be given, and this might be accomplished by sending the person at his last known address a copy of the resolution certified by the secretary of the board. A copy of the resolution should be sent to the State Board of Health.

CHIROPRACTORS

September 13, 1945.—045-287.

CIRCULAR ON FREE X-RAY EXAMINATIONS

QUESTION: Is the language of a circular, indicating that preliminary X-ray examinations are free, a violation of Chapter 20871, Section 12, Paragraph B (2a), General Laws of 1943?

To Mr. George M. Coates, D.C., Vice-President, State Board of Chiropractic Examiners, Bradenton, Florida:

In reply to your inquiry, I beg leave to state that Chapter 20871, referred to by you in your letter, was passed by the session of 1941 instead of 1943 as indicated.

The applicable language of the advertising circular enclosed in your letter is as follows:

- (A) "X-ray examinations are made before treatments are started."
- (B) "This procedure . . . costs nothing more."
- (C) "It cost nothing to investigate."

This statute was carried forward into Florida Statutes Annotated as Section 460.11 and appears as Subparagraph (c) of Paragraph (2) of said Section 460.11 and reads as follows:

"No chiropractor shall in any advertisement in any publication of the State of Florida advertise the prices for which the services are available."

I do not find in the advertising circular any schedule or other statement of prices for services but only the foregoing quoted language from which it may be implied that the preliminary examination which occurs before treatment costs nothing.

In my opinion, this matter does not constitute a violation of the section to which your inquiry refers.

January 22, 1945.—045-13.

CANCELLATION OF CONVENTIONS—ANNUAL EDUCATIONAL MEETING

QUESTION: What effect has the war mobilization director's request for cancellation of conventions of more than fifty persons on the annual two-day educational meeting for chiropractors and on the requirement under Section 460.27, Florida Statutes, 1941, that they attend such meeting or its equivalent as prescribed by the State Board of Chiropractic Examiners?

To Dr. Daniel K. Kirk, President, Florida State Board of Chiropractic Examiners, Jacksonville, Florida:

At this time there is no copy of the director's pronouncement available in Tallahassee. A usually reliable newspaper source (the New York Times of January 6, 1945), states that on January 5th said director "requested" cancellation of conventions and trade shows requiring the attendance of more than fifty persons after February 1st unless they are determined to be necessary to the prosecution of the war; that said "request" has no element of compulsion but that the director has set up a committee to receive and pass on applications for the holding of such group meetings; and that he has appealed to hotel managements to refuse reservations for meetings not approved by such committee. For present purposes I am assuming that this newspaper account correctly states the matter.

Unless and until the war mobilization director issues a directive positively prohibiting such group meetings, the Florida Association of Chiropractors will not be violating the law if it holds the usual two-day meeting in October. However, in compliance with the existing "request," it would be well to obtain the approval of the director's committee before scheduling such meeting in order to avoid unfavorable publicity and also to avoid the possibility of being refused hotel accommodations out of deference to said "request." If such approval cannot be obtained or if a prohibiting directive should later be issued, the board may stay within the law and at the same time substantially accomplish its purpose in having the two-day educational session by proceeding as hereinafter suggested.

Section 460.27, Florida Statutes, 1941, contains the following provision:

"All persons who are now or may hereafter be regularly licensed to practice chiropractic in the State of Florida shall, on or before the first day of October, annually hereafter renew his or her license and pay a renewal fee of five dollars each year to the state board of chiropractic examiners; provided that, beginning on the first day of October, 1942, in addition to the payment of such renewal fee, each licensee so applying for a license renewal

shall furnish to said board satisfactory evidence that he or she has attended the two-day educational program as conducted by the Florida Association of Chiropractors, or its equivalent as approved by the state board of chiropractic examiners of the State of Florida, in the year preceding each such application for a renewal." (Emphasis supplied).

This statute prescribes as a prerequisite to the renewal of a chiropractor's license that he shall furnish the board satisfactory evidence that he has attended either (1) the two-day educational program as conducted by the Florida Association of Chiropractors, or (2) its equivalent as approved by the State Board of Chiropractic Examiners.

Therefore, if it should be inexpedient or impossible to hold the usual two-day educational program in October because of any action of the war mobilization director, the board may prescribe an equivalent to be met by chiropractors as a prerequisite to renewing their licenses. Such equivalent might well be group meetings of less than fifty chiropractors each in lieu of the usual state-wide meeting. By complying with an equivalent program prescribed by the board, a chiropractor would be fully protected and would be entitled to renew his license just as though he had attended the usual two-day meeting and at the same time the educational program being sponsored by the board would not be neglected.

DENTISTRY

February 15, 1945.—045-44.

FLORIDA STATE BOARD OF EXAMINERS—DEPOSIT OF FUNDS; BONDS

QUESTIONS: 1. May state banks in the State of Florida lawfully pledge securities to protect deposits of public funds?

2. Are the funds collected and disbursed by the Board of Dental Examiners under Section 466.20, Florida Statutes, 1941, public funds?

To Honorable J. M. Lee, State Comptroller:

In the case of First American Bank and Trust Company v. Town of Palm Beach and same v. Board of Commissioners of Lake Worth Inlet District, 117 So. 900, the Supreme Court of Florida in the 3rd headnote and supporting opinion (page 903) answers this first question in the affirmative and holds that state banks in Florida may lawfully pledge securities to protect deposits of public funds.

By Section 466.06 it appears that the members of the board are appointed by the governor of the State of Florida and the term is limited so as to be within the four-year period. Hence it appears that the members of the board are public officers.

The funds collected and disbursed by the board are made up of the examiner's fee of \$30.00 paid by the applicants for licenses to practice, which funds are disbursed for the compensation of the board members and the expenses of the board.

While the question "what are and what are not public funds" is far from clear in cases like the present, and while there is no requirement that they be deposited in the state treasury, and while the decisions on cases involving police and firemen's pension funds are not in accord, nevertheless in the instant case where they are collected by public officers and deposited by them for the public purposes sought to be obtained by the statute, and in view also of the fact that the Lake Worth Inlet District was an organization, the funds of which were similarly handled by the commissioners and were held in the cited cases, at least by assumption, to be public funds, it is my opinion that the funds of the Florida State Dental Board are public funds and that state banks in the State of Florida may lawfully pledge securities to protect deposits of such funds.

NATUROPATHY

June 26, 1946.—046-275.

PRACTICE OF MATERIA MEDICA—REMEDIES

QUESTION: Does the prescribing of each of the following substances, preparations or devices by a naturopathic physician constitute the practice of materia medica within the prohibition of Section 462.01, Florida Statutes, 1941: ascorbic acid tablets; argyrol; quinine sulphate; Young's Rectal Dilators; phenobarbital; adrenalin solution, epinephrine hydrochloride for injection; Palagren; B-G-Phos.; Amesec Capsules; penicillin-aluminum hydroxide; Prothricin; Occy-Crystine?

To Honorable Clyde H. Wilson, State Attorney, Sarasota, Florida:

Section 462.01, Florida Statutes, 1941, as amended by Chapter 21707, Laws of 1943, authorizes naturopaths to employ various branches of science in the practice of their profession, including phytotherapy, dietetics and bio-chemistry; but it is specifically provided "that nothing in this chapter shall be held or construed to authorize any naturopathic physician licensed hereunder to practice materia medica." Regardless of the privileges purportedly granted by other portions of the statute, this proviso prohibiting the practice of materia medica by naturopaths must be given controlling effect. *Perry v. Larson*, 104 F. 2d. 728.

Here we are not concerned with what a naturopath may do; but with what he may not do. The test is whether a chemical, drug, or substance is embraced within that branch of medical science known as materia medica. If so, the naturopath is forbidden to prescribe it, even though it is also included in some other branch of science that he is authorized to employ in his practice.

Many of the items enumerated by you are proprietary preparations, so it is necessary to know their main ingredients in order to answer your question. Therefore, I shall give a brief description of each of the items enumerated in the question.

Ascorbic acid tablets.

Ascorbic acid, or vitamin C, is abundant in fresh fruits, especially citrus. Its best known use is in the prevention or treatment of scurvy. These tablets contain ascorbic acid in concentrated form.

Argyrol.

This is a trade name for silver vitellin, a silver-protein compound. It is commonly used in an aqueous solution as a local antiseptic for the eye, ear, nose, throat and geniteurinary organs.

Quinine sulphate.

This is one of the salts of an alkaloid extracted from cinchona bark. The sulphate is used in the treatment of various diseases, among which is malaria.

Young's Rectal Dilators.

These are mechanical devices.

Phenobarbital.

Phenobarbital, a derivative of barbituric acid, is a hypnotic and sedative.

Adrenalin solution, epinephrine hydrochloride for injection.

Adrenalin was the original trade name under which a compound of an extract from the suprarenal gland was marketed. The compound has been prepared and synthesized under various other names, such as epine-

phrine. Injections of epinephrine hydrochloride are employed for various purposes, among which are as a heart stimulant and hemostatic. It is somewhat commonly utilized in the treatment of asthma.

Palagren.

This is a proprietary preparation, the chief ingredients of which are phenobarbital sodium and bromides of sodium, potassium and calcium. These latter bromides are sedatives and phenobarbital sodium is a hypnotic and sedative.

B-G-Phos.

This is a commercial preparation designed as a tonic. Its main ingredients are B-complex vitamins in combination with glycerophosphates, the latter being esters or salts of glycerophosphoric acid.

Amesec Capsules.

This is a proprietary preparation, consisting chiefly of aminophyllin, ephedrine hydrochloride and amytal. Aminophyllin is a heart stimulant and diuretic, ephedrine hydrochloride is a circulatory stimulant and vasoconstrictor and amytal is a sedative and hypnotic. Among the uses of Amesec Capsules is the treatment of asthma.

Penicillin—aluminum hydroxide.

Penicillin is an antibacterial substance derived from the mold *penicillium notatum* and is effective in combating various classes of infections. Aluminum hydroxide is a mild astringent, in combination with which penicillin is administered orally.

Prothricin.

Prothricin is a proprietary preparation containing tryethricin and propadrine hydrochloride. The preparation acts as a vasoconstrictor and decongestant and is employed as nasal drops.

Ococy-Crystine.

This is a proprietary preparation containing magnesium sulphate (epsom salts), potassium sulphate, calcium sulphate and sodium thio-sulphate. Among the uses of the preparation is as a laxative.

Young's Rectal Dilators are mechanical devices, so are not embraced within the science of materia medica. However, the basic ingredients of the other items set forth in the question are elements of that science and are included in standard works on the subject. Therefore, it is my opinion that the prescribing of each of the following substances or preparations by a naturopathic physician constitutes the practice of materia medica within the prohibition of Section 462.01: ascorbic acid tablets; argyrol; quinine sulphate; phenobarbital; adrenalin solution; epinephrine hydrochloride for injection; Palagren; B-G-Phos.; Amesec Capsules; penicillin-aluminum hydroxide; Prothricin; Ococy-Crystine.

December 6, 1945.—045-380.

BOARD OF NATUROPATHIC EXAMINERS—DEPOSIT OF FUNDS

QUESTIONS: 1. Do the provisions of Section 2 of Chapter 22833, Laws of 1945, repeal conflicting provisions of Section 462.09, Florida Statutes, 1941, and require the fees collected by the State Board of Naturopathic Examiners to be paid into the state treasury and withdrawn therefrom by warrant of the comptroller?

2. Where the fees received by the State Board of Naturopathic Examiners from the issuance of licenses are by authority of law applied (a) to the expenses of the board in carrying out the act, and (b) the

remainder divided equally among the members of the board, do the provisions of Chapter 22857, Laws of 1945, require the State Board of Naturopathic Examiners to file with the budget commission the budgetary information mentioned in Section 10 of said Chapter 22857?

To Florida State Board of Naturopathic Examiners, Tampa, Florida:

Answering your first question,—I have held that the funds of the State Board of Naturopathic Examiners come within the provisions of Chapter 22833, and such funds must be deposited in the state treasury and withdrawn by warrant of the comptroller; and that part of Section 462.09, Florida Statutes, 1941, permitting the deposit of funds in a private bank and the disbursement of same by checks or orders of the secretary-treasurer and the president of the board is in conflict with Chapter 22833, and was, in my opinions, repealed by the latter act.

The provisions of Section 10 of Chapter 22857, Laws of 1945, are applicable to the State Board of Naturopathic Examiners, and compliance of your board with that section and the other provisions of Chapter 22857 is required.

There are a number of state agencies which have heretofore handled their funds in the same manner as your board; and I think you will not find it impossible to comply with the law.

If the forms submitted by the budget commission are not suitable to the affairs of your board, that difficulty can be remedied if you will take it up with the secretary of the budget commission.

NURSING

May 21, 1946.—046-223.

REREGISTRATION—RECORDING CERTIFICATE

QUESTIONS: When a person has been duly examined and registered by the State Board of Examiners for Nurses as a registered nurse, but has not, after the lapse of a considerable period of time when such person has not practiced nursing or has been serving in the armed forces, recorded her certificate of registration in the office of the clerk of the circuit court of the county in which she resides,

(1) Should such person be requested to reregister with the said board and should such board thereupon issue to such person a new certificate of registration for the purpose of the recordation thereof as aforesaid, or

(2) Should the board request such person to reregister and to send to the board proof of the recordation of her certificate on Form 14?

To Miss Kathryn R. Gutwald, R. N., Secretary-Treasurer, Florida State Board of Examiners for Nurses, West Palm Beach, Florida:

It is my opinion that for the purpose of recording a certificate of registration as a registered nurse as required by Section 464.15, Florida Statutes, 1941, it is not in the circumstances above set forth necessary for the registered nurse to obtain or for the State Board of Examiners for Nurses to issue a new certificate of registration. It is legally sufficient for such purpose for a nurse who has been duly examined and registered by the board to record the certificate of registration theretofore received by her in the office of the clerk of the circuit court of the county in which she resides, provided her certificate is valid and unrevoked.

As you state in your letter that some of the nurses referred to in your question have been serving in the armed forces, it is to be noted that under the provisions of Section 485.02, Florida Statutes, 1941, as amended,

If a nurse was in good standing with the State Board of Examiners for Nurses and was entitled to practice or engage in nursing in the State of Florida at the time she became a member of the armed forces of the United States, then such nurse has remained in good standing without payment of fees to the board as long as she has been a member of the armed forces on active duty and for a period of six months after discharge from active duty as a member of the armed forces of the United States.

You omitted to enclose with your letter a copy of Form 14 referred to therein, but it is apparent from your statement of your question that Form 14 is the form provided by the board for use by nurses in sending to the board proof that they have recorded their certificates with the clerk of the circuit court.

It is recognized that the most practical way in which the board can effectively enforce the provisions of said Section 464.15 would be to require each nurse to furnish proof to the board of the fact of the recordation of her certificate. However, under the law as it stands today, the board is without power to make a legally enforceable rule to that effect. It is entirely proper, however, for the board to request each nurse to furnish proof of the recordation of her certificate as required by law and the full cooperation of nurses of the state in compliance with such request would enable the board to very effectively enforce the mandate of said Section 464.15.

November 30, 1945.—045-371.

STATE DIRECTOR OF NURSING EDUCATION

QUESTION: Is the proposed plan feasible for engaging a state director of nursing education for the purpose of raising standards of nursing education in this state, and paying the expenses thereof from the funds of the State Board of Examiners for Nurses?

To the Florida State Board of Examiners for Nurses, West Palm Beach, Florida:

It is settled that the powers of any state agency are circumscribed by the law creating it, and that no public funds can be expended without authority provided by statute. The law under which your board operates (Chapter 464, Florida Statutes, 1941) makes your secretary-treasurer the official inspector of training schools for nurses, and fixes her salary. Sections 464.02 and 464.04, Florida Statutes, 1941. Neither she nor the board is authorized to employ assistants. It also appears that said chapter does not authorize the expenditure of the moneys of your board for any purpose except the salaries of the board, and the board's expenses in the administration of said Chapter 464. I find nothing in said chapter which would authorize the engaging of a state director of nursing education, nor the expenditure of public moneys therefor.

It is my opinion that notwithstanding any great advantage which might accrue to the general public if your board were authorized to improve the standards of nursing in this state by the plan outlined in your letter, the same cannot be accomplished under the law as it stands at this time.

August 2, 1945.—045-220.

CERTIFICATE OF REGISTRATION—ISSUANCE TO ALIEN

QUESTION: When a woman has made written application to the State Board of Examiners for Nurses for the issuance to her of a certificate of registration as a registered nurse, alleging therein that she has been registered as a registered nurse under the laws of another state, but the board is advised that the woman is a person of questionable character who has recently engaged in activities derogatory to the stand-

ing and morals of the nursing profession, and that such woman is an enemy alien, what is the official responsibility of the board with respect to the issuance of said requested certificate of registration?

To Miss Kathryn R. Gutwald, R. N., Secretary-Treasurer, Florida State Board of Examiners for Nurses, West Palm Beach, Florida:

It appears from the documents enclosed with the said letter that the woman who has applied for the certificate of registration is a citizen of Germany; that she is a woman, lacking in good moral character, who has recently engaged in activities derogatory to the standing and morals of the nursing profession. In the light of the evidence contained in such documents, it is my opinion that it is the duty of the board to thoroughly investigate said woman and to determine the credence to which said documents are entitled. If the board finds that there exist any of the grounds for refusal to issue such certificate, as the same are set forth in Subsections (1) and (2) of Section 464.11, Florida Statutes, 1941, or that there exist any of the grounds for revocation of an existing certificate under Subsection (3) of the same section, or that said woman is not a person of good moral character (see Section 464.07, Florida Statutes, 1941), the board should notify the said woman that her application is denied.

As the said woman apparently desires to obtain a certificate of registration, without examination, under the provisions of Section 464.08, Florida Statutes, 1941, providing for the registration of nurses registered in other states, it should be noted that even though the applicant's documentary credentials would warrant the issuance of a certificate without examination under said section, such procedure is not mandatory upon the board. Therefore, even if the board should find that no grounds exist for the refusal to issue a certificate to the said woman, the board may in its discretion require her to comply with the examination and other requirements of Section 464.07, Florida Statutes, 1941, before a certificate will be issued to her, whenever the board feels that the public welfare will benefit therefrom.

It should further be noted that nowhere does it appear that said woman has graduated from a school for nurses other than the University of Berlin. Florida law (Section 464.07, Florida Statutes, 1941) requires that applicants for certificates of registration must have "graduated from a school for nurses connected with a hospital approved by the state board in which such school is located." Therefore, even if said woman has been registered in another state (and that fact is not yet established), unless said woman has in fact graduated from a school for nurses in some state of the United States meeting the above requirements, said other state cannot have requirements equivalent to those of the State of Florida, as required for the issuance of a certificate without examination under Section 464.08.

This opinion attempts to deal only with the official responsibility of the board in this matter. If in the course of its investigation the board or any of its members should find cause to believe that said woman has violated any law of the United States or any executive proclamation restricting the activities of enemy aliens, or any other law of the United States or any state, it is the personal duty of each member of the board to see that the proper authorities are notified.

August 13, 1945.—045-235.

BOARD OF EXAMINERS—EXPENDITURE OF FUNDS

QUESTION: What is the effect of Chapter 22833, Laws of Florida, Acts of 1945, upon expenditures of funds of the State Board of Examiners for Nurses?

To Miss Kathryn R. Gutwald, R. N., Secretary-Treasurer, State Board of Examiners for Nurses, West Palm Beach, Florida:

Chapter 22833, Laws of Florida, Acts of 1945, effective June 11, 1945, created five specific funds in the state treasury in lieu of all other funds theretofore created or established therein, and provided that all state revenues must be promptly deposited in the state treasury and immediately credited to one such fund, as designated in said law.

Nothing in said law affects the present setup or financial activities of the State Board of Examiners for Nurses. Under said law the board is required as heretofore to deposit all moneys received by it into the state treasury, and all warrants for expenditures of the board issue as heretofore upon the requisition of the board to the state comptroller.

April 14, 1945.—045-87.

STATE BOARD OF EXAMINERS—APPOINTMENT OF SUCCESSOR

QUESTION: When a member of the State Board of Examiners for Nurses resigns, said resignation designating an effective date therefor, and said resignation is accepted by the governor, does such member retain incumbency pending appointment and qualification of successor in office?

To Miss Florence V. Moore, Assistant Secretary-Treasurer, Florida State Board of Examiners for Nurses, Winter Park, Florida:

It is my opinion that your question as outlined above should be answered in the negative.

January 20, 1945.—045-12.

STATE BOARD OF NURSES' FUND—PAYMENT OF COUNSEL

QUESTION: Does the law permit the payment, from the State Board of Nurses' Fund, of the expenses of legal counsel, and other expenses in connection with the drafting or proposing of amendments to the Laws of Florida which affect the State Board of Examiners for Nurses?

To Miss Florence Moore, R. N., Secretary-Treasurer, State Board of Examiners for Nurses, Winter Park, Florida:

Chapter 464, Florida Statutes, 1941, defines the powers, duties and purposes of the State Board of Examiners for Nurses.

The board's powers are limited by the statute creating it. *State vs. Atlantic Coast Line R. Co.*, 56 Fla. 617, 47 So. 969. Nothing in Chapter 464, Florida Statutes, 1941, or Chapter 7831, Laws of Florida, Acts of 1919, from which Chapter 464 is derived, indicates that the board has the power to incur the expense of legal counsel or other expenses in the drafting or proposing of amendments to the Laws of Florida. On the contrary, however, Section 7, Chapter 22012, Laws of Florida, Acts of 1943, vests in the attorney general the duty of aiding members of the legislature, and all other departments and agencies of state government in the drafting of bills and amendments thereof, along with any other service in connection therewith, which is possible, within the appropriation.

Public funds cannot be diverted from their legitimate purpose to another purpose not authorized by law, however beneficial or meritorious it may be. *Supreme Forest Woodmen Circle vs. Hobe Sound Co.*, 138 Fla. 141, 189 So. 249.

For the aforesaid reasons, it is my opinion that the expenses in connection with the amendment of the laws of Florida are not authorized to be paid from the State Board of Nurses' Fund.

PHARMACISTS

August 17, 1945.—045-242.

BOARD OF PHARMACY—APPROPRIATION FOR EXPENSES

QUESTIONS: 1. Having deposited its funds in the state treasury, is there any appropriation of such funds for the payment of the authorized expenses of the Board of Pharmacy within the meaning of Section 4, Article IX, of the constitution?

2. If the answer to the foregoing question is in the affirmative, is it necessary for the Board of Pharmacy to approve all requisitions, or is the approval of the secretary-treasurer of the board sufficient?

To Honorable J. M. Lee, State Comptroller:

"An appropriation of money is the setting it apart officially, out of the public revenue for a special use or purpose, in such manner that the executive officers of the government will have authority to withdraw and use that money, and no more, for that object, and for no other."—*State v. Lee*, 163 So. 859, 868.

In *State vs. Southern Land and Timber Company*, 33 So. 999, our court said that the following provision in a statute was an appropriation within the meaning of Section 4, Article IX, of the Constitution:

"There shall be annually levied and collected upon the assessable property of the state, a tax of not more than half a mill, the revenue derived from which assessment and collection shall constitute a special fund to be used for public health purposes of the state."

This holding was approved in *Amos vs. Moseley*, 77 So. 619.

In *State vs. Allen*, 91 So. 104, an attack was made on the provisions of a statute as violative of Section 4 of Article IX, of the Constitution. The pertinent part of the statute attacked was as follows:

"All moneys paid into the state treasury under the provisions of this chapter, except such as shall first be set aside to pay for number plates, postage on same, and the actual clerical work required under the provisions of this chapter . . ." etc.

The court said:

"The word 'appropriation' is not used in connection with the setting aside of a portion of the money to pay for number plates, postage and clerical work, but it is as much an appropriation as if that word were used. It is a setting part of money formally or officially for a special use or purpose (see *Funk and Wagnall's Standard Dictionary*), and, where that is done by the legislature in clear and unequivocal terms, it is an appropriation.

"Statutes setting apart or designating public moneys for special governmental purposes have been held to be appropriations, notwithstanding the word 'appropriation' is not used."

In that case, the court again approved the holding in the case of *State vs. Southern Land and Timber Company*. See also *Lainhart vs. Catts*, 75 So. 47.

All of the funds of the Board of Pharmacy for the State of Florida are derived from fees authorized by statute. Section 465.04, Florida Statutes, 1941, reads, in part, as follows:

"The fees provided for in this chapter shall be used by the board of pharmacy in the execution of its duties and for the advance of the arts and science of pharmacy."

Under the foregoing authorities, it is my opinion that the quoted portion of Section 465.04 is a sufficient appropriation of funds deposited by the Board of Pharmacy within the meaning of Section 4, Article IX, of the Constitution, and that warrants for disbursement may lawfully be issued upon proper requisition.

The statutes refer to a secretary of the board; there is no reference to a treasurer. The only statutory duties required of the secretary are to receive the registration fees, to receive notices of change of address of pharmacists, to give notice to those pharmacists who have not indicated a desire to renew registration, and to make an annual financial report to the governor and to the Florida State Pharmaceutical Association covering receipts and expenditures and names of registered pharmacists who have paid the registration fee. His duties are clerical. All of the more important duties, powers and authority seem to be vested in the board. It is my opinion that requisitions for disbursement of funds deposited in the state treasury should be approved by the board.

March 19, 1945.—045-73.

CERTIFICATE OF REGISTERED PHARMACIST—REVOCATION OR SUSPENSION

QUESTION: May the Board of Pharmacy suspend or revoke the registration certificate of a registered pharmacist who has been arrested and charged with a violation of Section 465.13, Florida Statutes, 1941, and who forfeited his appearance bond instead of appearing for trial?

To Mr. R. Q. Richards, Secretary-Treasurer, State Board of Pharmacy, Fort Myers, Florida:

It is my opinion that, in the absence of a judgment of conviction, the board could only revoke or suspend the registration certificate of a person who had **wilfully** or **repeatedly** violated any of the provisions of the act, upon sufficient evidence produced before the board of such **wilful** violation, or repeated violations.

In the absence of sufficient evidence of either a **wilful** violation or repeated violations, a certificate could be suspended or revoked, only following a conviction for violation of the act.

PLUMBERS

July 30, 1945.—045-214.

SEWAGE DISPOSAL—DUTIES OF HEALTH UNITS AND PLUMBING INSPECTORS

QUESTIONS: 1. Under House Bill No. 1047, Chapter 23258, Acts of 1945, do the duties of the plumbing inspector extend to sewage treatment or sewage disposal? (Included in sewage treatment or disposal would be main sewage lines, septic tanks, tile absorption fields, etc.). More specifically, is authority to issue permits, inspect and approve septic tanks and other sewage treatment devices and tile absorption fields and other sewage disposal devices vested in the State Board of Health or in the plumbing inspector?

2. What are the duties of the county health units in regard to the disposal and treatment of sewage, and do they or do they not function under the general, over-all authority of the State Board of Health and Florida State Sanitary Code?

To the State Board of Health, Jacksonville, Florida:

Sections 2 and 3, Article XV of the Constitution read as follows:

"Section 2. The State Board of Health shall have supervision of

all matters relating to public health, with such duties, powers and responsibilities as may be prescribed by law.

"Section 3. The county boards of health shall have such powers and be under the supervision of the state board to such extent as the legislature may prescribe."

In harmony with the constitution, the legislature recognized that the very nature of the duties of the State Board of Health requires statewide and complete jurisdiction in all matters pertaining to health and sanitation.

Chapter 381, Florida Statutes, 1941, specifically sets out some of the powers, duties and responsibilities of the State Board of Health. To mention a few of them, the board is given jurisdiction over water supply and prevention of its pollution; approval of waters; all matters pertaining to sewage and its disposal and treatment; power to require correction of improper conditions relating to water supply, sewage, etc.; authority to adopt a sanitary code covering in great detail matters affecting public health, and including specifically sewage, drainage, plumbing, etc.; providing that such sanitary code should supersede any regulations of any state department or ordinances of municipalities; giving the State Board of Health supervision and regulation of municipal and county sanitation and general supervision over local health authorities, requiring the latter to enforce the State Sanitary Code.

Chapter 387 gives the State Board of Health jurisdiction over the prevention of pollution of surface and underground waters.

Chapter 469, relating to plumbers in cities of 7,500 population or more, provides in Section 469.05 that the plumbing department of every such city shall be under the supervision of the board of health of the city or town.

Section 154.04 requires county health unit personnel to be employed only when approved by the state health officer and that their duties and compensation shall be fixed by the State Board of Health with the approval of the county commissioners.

Section 154.05 authorizes two or more counties to combine in the establishment of a health unit. In such event, funds raised therefor are deposited in the state treasury to the account of the State Board of Health and are disbursed by the State Board of Health in and on behalf of the counties. Also, the work done by such combined health unit shall be under the control and direction of the state health officer.

Section 469.06 provides that the county commissioners in counties containing cities or towns of populations of 7,500 or more, according to the latest federal census, shall appoint a plumbing inspector and make it his duty "to inspect all plumbing and drainage installed in the territory embraced in a radius of one mile from said cities' or towns' limits and to do such other work as the county commissioners may require."

The provisions of Chapter 23258 cover the whole county of Duval except the area within incorporated cities and towns. The bill provides that the plumbing inspector shall "inspect all plumbing and drainage installed within the area" covered by the act "and to do such other work as the county commissioners or governing board of the county may require." Chapter 23258 was built upon Section 469.06 and is almost identical in language, but covers area not within cities and towns.

A plumber is defined in Webster's New International Dictionary as:

"Originally, a worker in lead; now an artisan who works in lead, zinc, tin, sheet metal, etc.; especially, a tradesman who furnishes, fits, and repairs gas, water, and soil pipes, cisterns, tanks,

baths, water closets, and their fittings, and other sanitary and fire-protection apparatus for a house or other building, including the junctions to the mains and sewers."

In Webster's Twentieth Century Dictionary, plumbing is defined as:

"The art or the business of putting into buildings the necessary pipes and other fittings for securing and controlling the supply of water and for facilitating the drainage, much of the material used being lead."

Drainage is a very broad term, including even natural or artificial streams and open ditches. Ordinarily, the work of the plumber, as to drainage, relates to such work within and immediately adjacent to buildings and structures. As applied to plumbing, it is confined to drainage within a structure and immediately adjacent thereto. Where the word "drainage" is used in Chapter 23258, it must be limited to that sense, and it has been so construed by the courts. See *People vs. Osborne*, 269 N.Y.S. 409, and *Warburton-Beacham Supply Co. vs. City of Jackson*, 118 So. 606. It is used in that sense in Chapter 469 of the statutes. See first paragraph of Section 469.05.

Soil pollution, whether above or under ground, creates water pollution, which is a matter strictly, solely and exclusively within the jurisdiction of the health authorities. Sewage disposal or treatment by carrying it off through main sewer lines, disposal at septic tanks, or field absorption is definitely within the exclusive jurisdiction of the health authorities.

It is my opinion that the jurisdiction of the plumbing inspector does not extend to sewage treatment or disposal and that authority to issue permits, and to inspect and approve the installations mentioned in the first question is vested exclusively in the State Board of Health.

Consideration of the constitutional provisions and the above mentioned and other statutes on the subject makes it clear to me that the design and purpose of the people and the legislature is for a statewide organization, the State Board of Health, to have complete jurisdiction over all matters of health and sanitation, and that smaller health units, county and municipal, must operate under rules and regulations not in conflict with those of the State Board of Health. All health units and departments in the state must conform to the State Sanitary Code.

FUNERAL DIRECTORS

September 16, 1946.—046-405.

FUNERAL PARLOR—NON-LICENSED OWNER

QUESTION: May "A", who does not hold a funeral director's license, lawfully retain the full time services of a licensed funeral director and embalmer to carry on a funeral directing business which was purchased by "A" from a licensed funeral director who was in business at the time of passage of Section 5, Chapter 22617, Laws of 1945 (Section 470.10, 1945 Cum. Supp., Florida Statutes, 1941)?

To Honorable George A. Pierce, Jacksonville, Florida:

Chapter 470, Florida Statutes, 1941, does not appear to in any way prohibit ownership by any person of a funeral home, equipment, supplies, etc., but seems to deal with "operation" of such and the profession of funeral directing and embalming.

Section 470.21 states that "It is unlawful for any person to engage in the profession of funeral directing or embalming or practice the same or profess to practice the same or to hold himself out to the public as a funeral director or embalmer without having a license as provided in this chapter, * * *."

Subparagraph (3), Section 470.01 states that "The term 'funeral directing' as used in this chapter, shall be construed to mean the profession of directing or supervising funerals for profit, or the profession of preparing dead human bodies for burial by means other than embalming, or the disposition of dead human bodies, or the provision or maintenance of a place for the preparation of dead human bodies." Subparagraph (4) of the same section defines "funeral director" to mean, among other things, "one who meets the public, displays and sells funeral supplies, plans details of funeral services with members of the family and minister, and directs and supervises such services, completes financial arrangements for funerals, or uses in connection with the profession of funeral directing the words or terms 'funeral director,' 'undertaker,' 'mortician,' or any other word or term from which can be implied the practicing of the profession of funeral directing or the holding out to the public that one is engaged in the profession of a funeral director."

It is therefore my opinion that a person who is not a licensed funeral director may own a funeral home and retain a licensed funeral director and embalmer to carry on such business; provided, that the owner does not actually take any part in the operation of the business, and does not use his name in connection with the business.

I am further of the opinion that such an owner and such licensed funeral director retained to operate such business may comply with the fictitious name law (Section 865.09, Florida Statutes, 1941) in such a manner that the owner does not hold himself out to the public as engaging in the business of funeral director, however, such would necessitate a carefully drawn notice different from the usual form of published notice used to comply with the fictitious name law.

July 30, 1946.—046-325.

INCORPORATION—POWERS

QUESTIONS: In July, 1945, the secretary of state received and filed a certificate of incorporation for the "A" Funeral Home, Inc., which certificate, among other powers, provides that the corporation is empowered to carry on the business of funeral directors and embalmers. Subsequent to acceptance and filing of such certificate, the secretary of state noticed the provisions of Section 470.10, subsection 5, 1945 Supplement to Florida Statutes, 1941, which apparently prohibits corporations from engaging in the business of funeral directing or embalming. In view of the foregoing: (1) Was the certificate of incorporation of "A" Funeral Home, Inc., which, among other things, authorizes it to engage in the business of funeral directing and embalming, improperly filed? (2) If such certificate was improperly filed, what would be the proper procedure to have the same cancelled?

To Honorable R. A. Gray, Secretary of State:

Article II (a) of the above mentioned certificate of incorporation on file in the office of the secretary of state, pertaining to the general nature of the business to be transacted by the corporation, provides:

"To carry on business as funeral directors, embalmers, to buy, sell and deal in caskets, graves, vaults, at wholesale or retail, and to do any and all things necessary to carry on and conduct a funeral home, and to deal in all kinds of goods, merchandise and commodities of every sort, kind and description necessary or connected with the conducting of funerals and operation of a funeral home."

In addition to the above, the remaining provisions of Article II of the certificate sets forth in detail many other kinds and types of business not related to any of the matters detailed in above-quoted paragraph (a).

Chapter 470, Florida Statutes 1941, as amended, deals with funeral directors and embalmers. Chapter 22617, Laws of Florida, Acts of 1945, amended certain sections of said Chapter 470, and sections, as amended are found in the 1945 Supplement to Florida Statutes 1941. The section numbers hereafter mentioned refer to those found in the 1945 Supplement.

Section 470.01 (2) (3) and (4) defines "embalmer," "funeral directing" and "funeral director." Section 470.10 (5) provides, in part, that after "the effective date of such law (May 16, 1945) no corporation shall engage in the profession of funeral directing or embalming and no person licensed under this chapter as an embalmer or funeral director shall engage in the profession of funeral directing or embalming under a corporate name . . ." This law further provides that same should not affect or impair the rights now held by corporations or an embalmer or funeral director now engaged in the profession of funeral directing or embalming under a corporate name.

There is a further proviso in said Section 470.10 (5) "that any person engaging in the profession of funeral directing or embalming under a corporate . . . name and securing a license from and after the date this law becomes effective" should maintain certain described signs at his funeral home, mortuary or funeral establishment setting forth the name of the person or persons licensed to engage in the profession of funeral directing or embalming at such place. It would seem that this last proviso refers to those corporations so functioning at and prior to the effective date of the law.

It seems to be the rule that there is no valid incorporation if the purposes or powers specified in the charter or certificate of incorporation are illegal or unauthorized under a statute, even though approved or filed by the proper officer. *Indiana Bond Co. v. Ogle*, 22 Ind. App. 593, 54 N.E. 407. However, if certain of the purposes or powers are valid and others not, it would appear to be the better rule that only such illegal or unauthorized matters are void, leaving the corporation a *de jure* one as to the lawful powers and purposes therein contained. *State vs. Penn-Beaver Oil Co.*, 4 N.W. Harr. 81 (Del.), 143 A. 257; *McIlvane vs. Foreman*, 292 Ill. 224, 126 N.E. 749; *Colcord vs. Granzow*, 137 Okla. 194, 278 P. 654. It seems, further, to be the rule that the power of a court or officer to revoke a certificate of incorporation or charter after issuing or granting same, depends upon the statute and is limited thereby. *Illinois Watch Co. vs. Pearson*, 140 Ill. 423, 31 N.E. 400; 14 C.J. 149, section 150; 18 C.J.S. 445, section 60.

In view of the foregoing, in my opinion the above questions are properly answered in their numbered order as follows:

(1) It would appear that to the extent that the certificate of incorporation of "A" Funeral Home, Inc., authorizes such corporation to engage in the business of funeral directing and embalming in Florida, the powers thus granted are void and such matters constitute surplusage in the certificate; but to the extent that the certificate describes other purposes of the corporation which are not prohibited, the certificate is valid and the corporation as to such is a *de jure* one.

(2) Considerable doubt exists, since the statutes prescribe no procedure, that the secretary of state may revoke the certificate in whole or in part. Of course, if the corporation engages in the business of funeral directing or embalming, the attempted exercise of such powers may be tested by *quo warranto*. It is noted that under Chapter 470, Florida Statutes 1941, as amended, funeral directors and embalmers must be possessed of certain qualifications and be licensed, and that annually such licenses must be renewed. It would seem that this corporation, in view of the quoted provisions of above Section 470.10, could not receive a license to function either with respect to funeral directing or embalming.

It is suggested that the secretary of state notify the corporation of these void purposes appearing in its certificate of incorporation; and that a copy of such notification be sent to the state board of funeral directors and embalmers, and that in such notice the said corporation be specifically advised that it is not entitled to function as embalmers and funeral directors in Florida because of the acceptance and filing of said certificate of incorporation in which such purposes are set forth.

January 31, 1946.—046-24.

VETERAN FEE EXEMPTION

QUESTION: Are disabled veterans of World Wars I and II exempt from payment of the annual renewal license fee required of funeral directors and embalmers by the provisions of Section 470.10, Florida Statutes, 1941, as amended by Section 5 of Chapter 22617, Acts of 1945?

To Honorable George A. Pierce, Attorney for the State Board of Funeral Directors, Jacksonville, Florida:

With regard to the licensing of funeral directors and embalmers by the State Board of Funeral Directors and Embalmers, Section 470.10, Florida Statutes, 1941, as amended by Section 5 of Chapter 22617, Acts of 1945, provides, in part, as follows:

"If the licensee shall desire a renewal of such license for the succeeding year, the board shall grant and issue the same without further examination upon the payment by said licensee of a renewal fee as follows: embalmer, \$10.00; funeral director, \$15.00."

Section 205.16, Florida Statutes, 1941, grants certain exemptions from the payment of business or occupational license taxes to disabled veterans of the Spanish-American War and World War I, and these exemptions are extended to disabled veterans of World War II by Chapter 21654, Acts of 1943.

Section 205.13, Florida Statutes, 1941, provides that:

"Fees or licenses paid to any board, commission or officer for permits, registration, examination, inspection or other regulatory purposes shall be in addition to and not in lieu of any occupational license tax required by this chapter or other law unless otherwise expressly provided by law."

The annual license payable to the State Board of Funeral Directors and Embalmers is within the category of "fees or licenses" described in this section. As has been uniformly held by this office, disabled veterans are not exempt from the payment of fees or licenses of that character. The exemption is applicable only to the ordinary occupational licenses assessed and collected for general state, county and municipal governmental purposes.

However, Section 485.02, 1943 Supplement to Florida Statutes, 1941, provides as follows:

"Any member of the armed forces of the United States of America now or hereafter on active duty, who, at the time of his becoming such a member, was in good standing with any administrative board of the State of Florida and was entitled to practice or engage in his profession or vocation in the State of Florida, shall be kept in good standing by such administrative board of the State of Florida, without registering, paying dues or fees or performing any other act on his part to be performed, as long as he is a member of the armed forces of the United States of America on active duty and for a period of six months

after his discharge from active duty as a member of the armed forces of the United States of America."

The effect of this section is to grant to all qualified veterans, whether disabled or not, a grace period of six months after discharge during which they may practice their professions without the necessity of paying license taxes such as those provided by Section 470.10, supra.

Therefore, it is my opinion that, subject to the qualification mentioned immediately above, your question should be answered in the negative.

PROFESSIONAL ENGINEERS

May 16, 1946.—046-205.

EMPLOYMENT OF INVESTIGATOR—BOARD MEMBER AS EMPLOYEE

QUESTIONS: 1. Can the board employ a field representative whose duties will be to investigate complaints and work with the attorney and the board on all matters relating to the duties, responsibilities, etc., of the State Board of Engineer Examiners and who will particularly aid the board in the matter of determining who are illegally practicing engineering and land surveying, that is, an implement to the board's action?

2. If the answer to (1) is affirmative, may one of the members of the board be so employed without necessitating his resigning from the board?

To Clayton and Arnow, Attorneys at Law, Gainesville, Florida:

In answer to your first question it is my opinion that the State Board of Engineer Examiners is authorized to employ a person to assist the board in matters relating to the duties and responsibilities of it. (Section 471.14, Florida Statutes, 1941).

In answer to your second question it is my opinion that the State Board of Engineer Examiners shall not employ one of its members to perform such services. I am aware of the fact that the courts are not in accord on this question of law but the majority opinion is that such contracts are against public policy. (43 Am. Jur. 63).

March 27, 1946.—046-110.

FIELD REPRESENTATIVE—MEMBER OF BOARD

QUESTIONS: (a) Can the board employ a field representative whose duties will be to investigate complaints and work with the attorney and the board on all matters relating to the duties, responsibilities, etc., of the State Board of Engineer Examiners and who will particularly aid the board in the matter of determining who are illegally practicing engineering and land surveying, that is, as an implement to the board's action?

(b) If the answer to (a) is affirmative, may one of the members of the board be so employed without necessitating his resignation from the board?

To Clayton and Arnow, Attorneys for Florida State Board of Engineer Examiners, Gainesville, Florida:

In my opinion the State Board of Engineer Examiners is authorized to employ a person to assist the board in matters relating to the duties and responsibilities of it.

It is further my opinion that such an employee may be a member

of the board and that such employment would not necessitate his resigning from the board.

Your attention is invited to my opinion of December 12, 1941, as the same appears in the 1941-1942 Biennial Report of the Attorney General, page 636.

January 9, 1946.—046-9.

REQUIREMENT OF CERTIFICATE

QUESTIONS: Where one is engaged in determining the locations and elevations of approximately 800 water and oil test wells in 64 counties of Florida and will make field notes and submit tabulations, plats and reports reflecting the results of his work to the other parties to the contract under which he is operating:

1. Is such person required by Chapter 471, Florida Statutes, 1941, to obtain a certificate as an "engineer" from the State Board of Engineer Examiners?

2. Is such person required by Chapter 472, Florida Statutes, 1941, to obtain a certificate as a "land surveyor" from the State Board of Engineer Examiners?

To Honorable E. A. Clayton, Attorney for the State Board of Engineer Examiners, Gainesville, Florida:

The first question should be answered in the negative. Chapter 471, Florida Statutes, 1941, deals with the qualification, licensing and regulation of "engineers" and contains an elaborate, but somewhat redundant and vague definition of "engineering." A careful reading of this chapter impels one to the conclusion that an "engineer" within its purview is not one who merely makes surveys, tabulations and plats, but is one who utilizes his engineering knowledge and skill in performing acts directly connected with some facility to be constructed or already in existence. In the construction of many works, such as highways, dams and transmission lines it is necessary that extensive surveys be made, but these are only incidental to the ends to be accomplished and of themselves alone do not constitute "engineering."

The contract of the person under consideration will have been performed when he submits his tabulations, plats and reports based upon his survey. The possibility that later, relying upon these results, the other parties to the contract may engage in well drilling operations that would involve the science of engineering is too remote from the activities in question to include them as part of those operations and so impress them with the character of "engineering."

The second question should also be answered in the negative. In the foregoing comments the word "survey" has been used in its broader sense and it is possible that the actions under consideration constitute "surveying" within that definition. However, the Florida statutes do not require one practicing "surveying" to procure a certificate from the State Board of Engineer Examiners. The pertinent requirement is confined to those practicing "land surveying" and this term has a rather narrow meaning according to the following definition contained in Section 472.01, Florida Statutes, 1941:

"A person practices 'Land Surveying' within the meaning of this chapter, who re-establishes the original lines and corners to townships, ranges, sections, and the subdivisions thereof, as established by the surveyors deputed by the surveyor general to survey the public lands of Florida; who subdivides the land in accordance with rules and regulations prescribed by the general land office and the laws of Florida; who surveys and other-

wise determines on the ground the plane boundaries of tracts and parcels of land, traverses the boundaries of lakes, water-courses, seacoast and similar natural features; who resurveys on the ground lines and subdivisions surveyed at a previous date by himself or other surveyors; and who otherwise performs recognized acts of land surveying in connection with the establishing and re-establishing of boundaries of tracts of land."

The activities of the person under discussion do not fall within any of these categories. He is not determining the boundaries of areas of the earth's surface but is merely ascertaining the location and elevation of various wells in relation to recognized and established markers. Essentially, he is only determining the distance and direction from one point to another.

PUBLIC ACCOUNTANTS

June 28, 1945.—045-161.

STATE BOARD OF ACCOUNTANCY—COUNSEL, OFFICERS

QUESTIONS: 1. Has the State Board of Accountancy the right and power to engage an attorney to handle a case of mandamus against the board? Also, in a trial, before the board, of a licensed C. P. A. on charges that may result in suspension or revocation of his certificate, has the board the right to engage an attorney to conduct the trial for the board?

2. Has the board the right and power to elect one of its members as secretary for a year, from July 1, 1945 to July 1, 1946, when the member's term expires during the month of August, 1945, on the theory that he will be reappointed by the governor for a new term of four years?

To the State Board of Accountancy, Tampa, Florida:

In Section 473.05, Florida Statutes, 1941, there is implied authority in your board to employ counsel, and it is my opinion that you have that authority.

Section 473.06, of the statutes, relates to the selection of a secretary. The only qualification required of the secretary is that he be a member of the board. It is my opinion that any member of the board may be elected secretary, regardless of when his term as a member may expire. If his term as a member of the board expires before the end of the year after his election as secretary, another secretary can be elected in his place.

The letter from your board member also inquires whether this office can represent the board in such matters as set out in your first question. I shall be glad to handle such matters upon request of the board.

December 6, 1945.—045-374.

STATE BOARD OF ACCOUNTANCY—POWERS

QUESTION: Where a person, pursuant to the provisions of the first paragraph of Section 3922, C. G. L. 1927, made application prior to December 31, 1927, for the issuance to him without examination of a certificate to practice as a certified public accountant and such application was denied, does the present State Board of Accountancy have the power to waive examination and issue a certificate to such applicant if it should adjudge that at the time such application was made he possessed the qualifications prescribed by the first paragraph of the said Section 3922 and by Section 3917 referred to therein?

To Honorable Millard F. Caldwell, Governor:

The first paragraph of Section 3922, Compiled General Laws of 1927 provided:

"The state board of accountancy may, in its discretion, waive the examination of any person possessing the qualifications mentioned in Section 3917 whose record and professional standing are satisfactory to the said board, who shall have practiced public accounting for five years preceding June 1, 1927, of which the three years immediately preceding that date shall have been in Florida, and who shall apply in writing to the said board for such certificate before December 31st, 1927. Each such applicant shall pay a minimum fee of twenty-five dollars."

The time limit within which such applications might be made was extended indefinitely by Section 30 of Chapter 15637, Acts of 1931, but that section of the act was specifically repealed by Chapter 17266, Acts of 1935, which became a law on June 7th of that year. Consequently, the time has long since passed when one might apply for and receive a certificate, without examination, under the provisions of the first paragraph of Section 3922, C. G. L. 1927. *Bourne v. Pentland*, 196 So. 606.

However, in the instant case timely application was made but was denied by the board. Nevertheless, during a period of approximately eight years, from the enactment of Section 3922, C. G. L. 1927, to the effective date of Chapter 17266, the applicant had the opportunity to renew his application and receive thorough consideration by the board. Evidently he availed himself of this opportunity but failed to resort to the courts for correction of what he deemed to be an arbitrary action of the board.

Therefore, it is my opinion that because of the repeal of the law under which it was made and denied and the lapse of time since its denial, the application has lost all vitality and the State Board of Accountancy is without power to act upon it and substitute its judgment for that of its predecessors.

The question here presented is distinguishable from that passed on in my opinion of January 25, 1943, regarding the power of the board to issue certificates without examination to certain persons engaged in the Internal Revenue Service of the United States. There I held that the second paragraph of Section 3922, C. G. L. 1927, under which the applications were made, was repealed through its omission from the Florida Statutes, 1941, but that by virtue of Section 5 of Chapter 20719, Acts of 1941, any rights which had accrued to the applicants through making application prior to the effective date of such statutes were preserved. The second paragraph of Section 3922 prescribed no time limit within which applications were to be filed and the applications were made shortly before the effective date of the Florida Statutes, 1941, and were still pending before the board at the time the opinion was rendered. I attach a copy of the opinion referred to.

In the light of the foregoing, I think your question should be answered in the negative.

May 24, 1946.—046-224.

VETERANS—EXPERIENCE

QUESTIONS: 1. May the State Board of Accountancy accept experience and service in the armed forces, of an accounting nature, as partially fulfilling the requirements of Section 473.08, Florida Statutes, 1941?

2. May the board accept any experience of an accounting nature, such as experience in public or semi-public institutions such as Farm Credit Associations, Land Banks, Agriculture Cooperative Associations, etc., as partially fulfilling the requirements of Section 473.08, supra?

To Mr. James I. Keller, Jr., C. P. A., Secretary, State Board of Accountancy, Miami, Florida:

My answer to both questions is answered in the affirmative.

The intent of the legislature in requiring "not less than three years experience in the practice of public accounting" (Section 473.08, Florida Statutes, 1941) was to insure the applicants desiring to take the examination would possess sufficient basic training and experience. If the applicant's training and experience is, in the opinion of the board, equivalent to what one would ordinarily receive in working in an office of a public accountant, you would be authorized to permit such applicant to take the examination as provided in said Section 473.08, provided he met the other qualifications described therein.

May 7, 1946.—046-202.

BOARD OF ACCOUNTANCY—BRANCH OFFICE-MANAGERS

QUESTION: "May the State Board of Accountancy adopt and enforce a rule providing that the manager of an office of a certified public accountant must likewise be a certified public accountant?"

To Mr. James I. Keller, Jr., C. P. A., Secretary, State Board of Accountancy, Miami, Florida:

"Some certified public accountants in this state maintain and operate branch offices and have in charge thereof a person who is not a certified public accountant. The theory of operation of these branch offices being that the owner, a certified public accountant, will supervise and be responsible for the work performed the same as he does in his principal office. However, as a practical proposition it does not work out that way but on the contrary the unqualified and unlicensed manager conducts its affairs and assumes a relationship with the public to all intents and purposes as though he was a licensed accountant."

Your attention is invited to what constitutes "public accounting" as provided in Section 473.02, Florida Statutes, 1941, and in particular do I invite your attention to paragraph 2 thereof which provides "who maintains an office for the transaction of business as a public accountant, or who, **except as an employee of a public accountant** (emphasis supplied) practices accounting, as distinguished from bookkeeping for more than one employer;"

Your attention is further invited to Section 473.04, Florida Statutes, 1941, relating to the powers of the board. You will observe that the powers of the board, in addition to the administering of Chapter 473, Florida Statutes, 1941, are briefly:

(1) Holding hearings, compelling attendance of witnesses, administering oaths, taking of testimony and receiving proof concerning matters within its jurisdiction.

(2) Formulate rules for its guidance.

(3) Prescribe standards of professional conduct and formulate reasonable rules defining unethical practices.

You are, therefore, not authorized to enlarge upon the definition of the term "public accounting" or what constitutes engaging in the profession of public accounting.

My answer to your question is, therefore, negative.

REAL ESTATE LICENSE LAW

December 17, 1946.—046-507.

BROKER—RESIDENCE REQUIREMENT

QUESTION: Is the Florida Real Estate Commission entitled under the real estate license law to require that an applicant for registration for either a broker or salesman be a resident of the State of Florida?

To Honorable T. P. Warlow, Jr., Secretary, Florida Real Estate Commission, Orlando, Florida:

It is my opinion that the above question should be answered in the negative.

You mention in your letter that Section 18 of Chapter 12223, Laws of Florida, Acts of 1927 provided that every such applicant (except non-active brokers) shall be a resident of State of Florida, but that this requirement was omitted in the 1941 revision.

Section 475.17, Florida Statutes 1941 now reads as follows:

"Every corporation applying for registration must be organized or authorized to do business under the laws of the State of Florida and shall have capacity to make valid contracts, and sue and be sued in this state. All applicants who are natural persons shall be competent, honest, truthful, trustworthy, of good character, and bear a reputation for fair dealing. Any previous conduct which would have been ground for revocation or suspension of registration, if the applicant were registered, shall be sufficient grounds for a denial of the application." "The members of every partnership which is an applicant must be qualified."

Section 16.20, Florida Statutes, 1941, provides:

"Every statute of a general and permanent nature enacted by the State of Florida, or by the Territory of Florida, and every part of such statute not included in the Florida Statutes, 1941, or recognized and continued in force by reference therein, is hereby repealed, effective as of the time the said 'Florida Statutes, 1941' become effective and are in operation."

It was held by the Supreme Court of Florida in the case of *National Bank v. Williams*, 38 Fla. 305, 20 So. 931 that:

"****not being included in those provisions of the Revised Statutes which cover the same subject matter ***** all provisions of the act ***** are repealed. *****"

Also in the case of *Davis v. Florida Power Co.*, 64 Fla. 246, 60 So. 759, it was held:

"As all statutes and parts of statutes of a general and permanent nature not included in the General Statutes, or are not recognized and continued in force by reference therein, were repealed by the enactments of the General Statutes, the omitted portions of the original act must be regarded as repealed, as they are material and constitute substantive law, and cannot therefore be supplied by intendment. The omitted portions of the original law are not recognized and continued in force by reference or otherwise in the General Statutes. * * * * *"

"Where the subject-matter and the purpose of a legislative enactment is ascertained, the language used should be construed so as to give effect to the lawmaking intent; such intent being the vital force of the enactment. Words contained in the statute should be interpreted with reference to the main purpose de-

signed and the limitation imposed by the fundamental law."
"Where it is apparent that substantive portions of a statute have been omitted and repealed by the process of revision and reenactment, courts have no express or implied authority to supply the omissions that are material and substantive and not merely clerical and inconsequential; for that would in effect be the enactment of substantive law. The statute in such a case should be effectuated as the language actually contained in the latest enactment warrants;"

It, therefore, appears to me that the residence requirement by not having been included in Florida Statutes, 1941, has been repealed, and the Florida Real Estate Commission is not entitled to require that an applicant be a resident of Florida.

BARBERS

July 21, 1945.—045-196.

BARBERS' SANITARY COMMISSION—EXPENSES OF MEMBERS

QUESTIONS: 1. Did Chapter 21913, Acts of 1943, increase the per diem allowance for subsistence for members of the Barbers' Sanitary Commission from \$4.50 to \$6.00?

2. Did Chapter 21913, Acts of 1943, increase the limitation of \$175.00 per month for the commission members' total expenses as fixed by Section 476.18, Florida Statutes, 1941?

To Honorable Bryan Willis, State Auditor:

Chapter 21913, Acts of 1943, fixed the per diem subsistence allowance for all state officers, and employees, and was applicable to members of the Barbers' Sanitary Commission. Your first question is answered in the affirmative. Your attention is called to the fact that Chapter 22830, Acts of 1945, made a further increase of the per diem subsistence allowance to \$7.50, and which likewise is applicable to the members of the above commission.

I find nothing in Chapter 21913, Acts of 1943, or in Chapter 22830, Acts of 1945, which can be construed as increasing the limitation of \$175.00 per month for the expenses of members of the Barbers' Sanitary Commission as fixed in Section 476.18. Your second question is answered in the negative.

February 22, 1946.—046-66.

VETERAN QUALIFICATION

QUESTION: Where one has received training as a barber for three and one-half years in the United States Navy and has been honorably discharged from the Navy as a barber, does the Barbers' Sanitary Commission have the authority to require such person to graduate from a school of barbering approved by the commission as a prerequisite to taking an examination for a certificate of registration as an apprentice barber?

To Honorable David L. Wiley, State Service Officer, St. Petersburg, Florida:

Section 476.06, Florida Statutes, 1941, provides that:

"Any person is qualified to receive a certificate of registration as a registered apprentice:

- (1) Who is at least sixteen and one-half years of age;

- (2) Who is of good moral character and temperate habits;
- (3) Who has graduated from a school of barbering approved by the commission;
- (4) Who has passed a satisfactory examination conducted by the commission to determine his fitness to practice as a registered apprentice."

Obviously it was the intent of the legislature, as expressed in the above statute, to require training as one of the prerequisites to taking an examination for a certificate of registration as an apprentice barber. That provision requiring graduation from a school of barbering approved by the commission undoubtedly was not intended by the legislature to apply to those who have had training equivalent to that which would be received in the prescribed course at such school. Any other construction of that provision would make it susceptible to grave constitutional objections.

The vocational training given to members of the armed services had the twofold purpose of increasing their usefulness while in the service and of preparing them for profitable employment in specialized fields upon their return to civilian life. It would be unreasonable to conclude that the legislature intended that the latter purpose should be defeated by denying credit to veterans for this training which they received while in the armed forces.

In the light of the foregoing, it is my opinion that your question should be answered in the negative, provided the training of the person under consideration is equivalent to that which would qualify him for graduation from a school of barbering approved by the commission.

March 28, 1946.—046-123.

SERVICE EXPERIENCE—EXAMINATION

QUESTIONS: (a) Has a veteran who has been licensed as a barber for a period of ten years in some other state and who has performed the duties of a barber for three and one-half years in the military service, the right to accept employment as an apprentice barber without first securing a certificate from the Barbers' Sanitary Commission?

- (b) Is such a veteran entitled to a license without first taking and successfully passing the examination?

To Honorable L. J. Nachtmann, County Service Officer, St. Johns County, St. Augustine, Florida:

My answer to both of your questions is no, because the law provides that among the prerequisites to the practice of barbering is a certificate from the Barbers' Sanitary Commission (Section 476.01, Florida Statutes, 1941), which is only issued after successfully passing the examination. (Section 476.05, subsection 5 and Section 476.06, subsection 4, Florida Statutes, 1941).

For your information, I attach copy of opinion recently delivered by me that deals with a kindred question to the one in the instant opinion. The opinion to which I refer holds that service barber experience does away with some of the schooling requirements.

March 28, 1946.—046-122.

VETERANS—EDUCATIONAL REQUIREMENTS

QUESTION: "Where the Barbers' Sanitary Commission fairly determines that a veteran has not received adequate training as a barber in

military service to qualify him to take an examination for a license as a registered apprentice barber, does the commission have the authority to require such veteran to attend a school of barbering approved by the commission for a length of time deemed necessary by it to qualify him to take such examination?"

To the Barbers' Sanitary Commission:

My answer to your question is answered in the affirmative. Obviously it was the intent of the legislature to require sufficient training as one of the prerequisites to taking an examination for a certificate of registration, either as a barber or as an apprentice. If the training as a barber in the military service is not equivalent to that which would be received in a prescribed course at an approved barbering school, you would be authorized to require such a veteran to complete the prescribed course of training. However, I invite your attention to the fact that there would be especially grave doubt as to any insufficiency of the veteran's training if he had the rating of barber or such other designation of barber as is assigned by the particular branch of the military service and that any requirements by your board that seemed to arbitrarily or unreasonably ignore this service rating would be subject to justical control.

BEAUTY CULTURE LAW

May 19, 1945.—045-113.

DEMONSTRATIONS WITHOUT CERTIFICATE OF REGISTRATION

QUESTION: Is a person, who, for the purpose of teaching beauty culture, demonstrates new hair styles by arranging, waving and beautifying the hair of another person, subject to prosecution for practicing beauty culture without a certificate of registration as a registered beautician, when such demonstrations are carried on in a school of beauty culture?

To Honorable W. E. Roebuck, County Solicitor, West Palm Beach, Florida:

Section 477.03 (1) (e), Florida Statutes, 1941, provides that the arranging, waving, dressing, etc., of the hair of any person constitutes the teaching and practice of beauty culture, when done for payment, either directly or indirectly, or without payment, for the public generally.

Section 477.02 (1) renders it unlawful for any person to engage in the practice of beauty culture without a certificate of registration as a registered beautician.

Section 477.27 (1) makes the violation of the provisions of Section 477.02 a misdemeanor and prescribes punishment by fine or imprisonment or both.

The activities of the person in question are clearly within the definition of "practice of beauty culture" as outlined above. The statute in question is a health statute, designed to prevent the spread of contagious disease in the beauty culture industry. See *United Enterprises v. Dubey*, 128 F. 2d 843, 845, affirming 42 F. Supp. 60. Such statutes should be given a liberal construction, in spite of any penal provisions contained therein. Sutherland on Statutory Construction, 3rd ed., Section 7202.

It is my opinion that your question, as outlined above, should be answered in the affirmative, if the activities in question were done for payment, either directly or indirectly, or without payment, for the public generally.

March 19, 1946.—046-106.

SALARIES—EXPENSES

QUESTIONS: 1. May the budget commission approve a basic per diem of \$50.00 per month for the executive secretary of the State Board of Beauty Culture?

2. May the said commission approve a \$5.00 per diem and mileage, as provided by Chapter 22830, Laws of Florida, 1945, while the executive secretary of said board is away from the board's place of business?

To The Budget Commission:

My answer to your first question is answered in the negative because the salary of the executive secretary of said board is fixed by law and the reimbursement for travel is fixed by Chapter 22830, Laws of Florida, 1945.

My answer to your second question is that the State Board of Beauty Culture may, under the provisions of Section 1, Chapter 22830, Laws of Florida, 1945, reduce the maximum per diem of \$7.50 per day for such an official while the official is traveling on official business, plus mileage, as authorized by said chapter.

Your attention is invited to my two opinions of October 3 and November 1, 1945, "045-310 and 045-344," where the subject is discussed at considerable length.

October 26, 1945.—045-335.

EDUCATIONAL LECTURES AND SPEAKERS—EXPENSES

QUESTION: May the State Board of Beauty Culture provide from its funds the sum of \$600.00 toward the payment of expenses of certain educational lecturers and speakers who are to appear before a joint session of the board with the Florida Hairdressers and Cosmetologists Association, Inc.?

To Honorable J. M. Lee, State Comptroller:

You state in your letter that "The Board of Beauty Culture's budget, as approved by the State Budget Board, shows an item in the reserve of \$10,000 for educational purposes." We are assuming that the budget referred to by you is the one under Chapter 216, Florida Statutes, 1941, as amended, and that there has been no approval of such budget by the Legislature, either directly or indirectly.

Prior to the enactment of Chapter 21984, Acts of 1943, Section 477.21, Florida Statutes, 1941, contained a provision authorizing the expenditure of funds by the board to promote and aid in educational programs and for supplying lecturers and practical demonstrations in this connection. These provisions were omitted from, and therefore repealed by, the amendment of said section made by said Chapter 21984. Section 477.21 is the section providing for the disposition of funds received by the board. In other words, it is the appropriation for the board. We must construe the amendment as accomplishing some change in the existing law, otherwise, there would have been no reason for the amendment (see State vs. Burr, 79 Fla. 290, 84 So. 61, text 74). Where a statute provides for the exercise of a certain named power by a board and such statute is amended by omitting the provision providing for that power, there can be but one reasonable construction, and that is that the power mentioned has been withdrawn. In this connection I do not think that the promotion of educational programs is a necessary adjunct to the exercise of the board's other powers.

The approval of a proposed budget required to be presented to the State Budget Board, by that board, cannot authorize the exercise of additional powers, by the State Board of Beauty Culture, not within its statutory grant of power.

I am, therefore, of the opinion that the above question should be answered in the negative.

October 17, 1945.—045-325.

BEAUTY CULTURE BOARD—EXPENSES

QUESTION: Is the limitation of expenses of the State Board of Beauty Culture, as provided by Section 477.20, Florida Statutes, 1941, superseded, until June 30, 1947, by Chapter 22830, Acts of 1945, in the same manner as you held in your opinion of October 2, 1945, relative to the Florida Board of Massage?

To Honorable J. M. Lee, State Comptroller:

This same question was answered in my opinion to the State Budget Commission under date of October 3, 1945, where your question was in effect answered in the affirmative.

I am enclosing herewith a copy of my said opinion to the State Budget Commission under date of October 3, 1945.

July 21, 1945.—045-195.

BEAUTY CULTURE INSPECTORS—EXPENSES

QUESTIONS: 1. Did Chapter 21913, Acts of 1943, increase the subsistence allowance of beauty culture inspectors from \$4.50 to \$6.00 per day?

2. Did Chapter 21913 increase the limitation of \$100.00 per month for expenses of such inspector?

To Honorable Bryan Willis, State Auditor:

Neither Section 477.20, of the statutes, nor its amendment by Chapter 21984, Acts of 1943, fixed a per diem expense for beauty culture inspectors. The only per diem fixed by that section was for board members. Accordingly, the inspectors' subsistence allowance would be covered by the general law, which is Section 112.06. That section fixed the subsistence allowance at \$4.50 per day for state officers and employees. It was increased to \$6.00 per day by Chapter 21913, Acts of 1943, and again increased by Chapter 22830, Acts of 1945, to \$7.50 per day. Your first question is answered in the affirmative.

I find nothing in Chapter 21913, Acts of 1943, or in Chapter 22830, Acts of 1945, which can be construed as increasing the limitation of \$100.00 per month for the expenses of beauty culture inspectors as fixed in Section 477.20, as amended by Chapter 21984, Acts of 1943. Your second question is answered in the negative.

August 2, 1945.—045-221.

BOARD MEMBERS—SALARIES

QUESTION: Has the State Budget Commission the power and authority to increase or decrease the amounts fixed by statute as salaries for members of the board or its other officers?

To Honorable Fred C. Elliot, Acting Director, State Budget Commission:

Section 477.20, of the Statutes of 1941, as amended by Chapter 21984, Acts of 1943, fixes the salary of each of the three members of the board

at \$150.00 per month, the salary of the executive secretary at \$175.00 per month, and the salary of each inspector at \$150.00 per month.

It is true that the legislature in its recent session increased the salaries of some state officers. It may be that the officer personnel of the Board of Beauty Culture should have had an increase in compensation, but this would have required an act of the legislature.

I find nothing in Section 10 and 11, or elsewhere, in Chapter 22857, Acts of 1945, which gives the State Budget Commission the power to either increase or decrease a salary of a state officer or employee which is fixed by statute. Its authority in the matter of increase or decrease of compensation is limited to members of the personnel who have no fixed statutory salary.

March 10, 1945.—045-64.

BEAUTY CULTURE BOARD—REAPPOINTMENT

QUESTION: In view of the requirements of Section 477.18, Florida Statutes, 1941, is a member of the State Board of Beauty Culture who, at the time of her appointment thereto was duly qualified for said appointment, subject to reappointment, although she is no longer engaged in conducting a beauty shop?

To Honorable Millard F. Caldwell, Governor:

Section 477.18, Florida Statutes, 1941, as amended by Section 13, Chapter 21984, Laws of Florida, Acts of 1943, places definite qualifications upon persons eligible for appointment as members of the State Board of Beauty Culture. One such qualification is as follows: "No beautician may be appointed as a member of the board who is not actually engaged in conducting a beauty shop." This qualification is without ambiguity, and the member of said board, whose eligibility for reappointment is questioned in your letter, is clearly within the terms of its prohibition.

The fact that the said member is now holding office, and was duly qualified at the time of her appointment to same can be of no consequence. The reappointment of which you speak, is, in legal effect, a new appointment and not a mere continuation of tenure under the original appointment. 46 Corpus Juris 970. See also Article III, Section 27 and Article XVI, Section 7, Constitution of the State of Florida.

For the foregoing reasons it is my opinion that your question should be answered in the negative.

PHOTOGRAPHY

March 29, 1945.—045-82.

STATE BOARD OF PHOTOGRAPHIC EXAMINERS—USE OF FUNDS

QUESTIONS: 1. When a circuit court has ordered the release from custody of an alleged violator of the Photographers' Law (Chapter 478, Florida Statutes, 1941) on writ of habeas corpus on the ground that said law is unconstitutional, is the State Board of Photographic Examiners authorized and permitted to exercise its usual functions such as the acceptance of applications, the conducting of examinations, paying salaries to employees' etc., during the time said order stands unreversed by a higher court?

2. Is the State Board of Photographic Examiners entitled to use any funds which it has on hand for the purpose of defraying the expenses of attorneys' fees and court costs previously incurred in a habeas corpus

proceeding which challenged the validity of the Photographers' Law, and also the expense of salaries, fees and costs in the appeal from an adverse ruling in such proceeding?

To Mr. W. L. Coursen, Secretary-Treasurer, State Board of Photographic Examiners, Daytona Beach, Florida:

In the case of Chavers vs. Harrell, Sheriff, 122 Fla. 669, 166 So. 261, the Supreme Court of Florida answered your first question as follows:

"A statute that is declared unconstitutional by a competent court is without force until the decision of the lower court is reversed by a higher court so as to preclude infliction of punishment for criminal violations of it, or the exaction of civil penalties for its nonobservance during the time the judicial declaration of invalidity stood unreversed by the higher court."

As I construe the above language of the supreme court, in application to your case, the board can continue to exercise its usual functions with the sole exception that it should not prosecute or threaten to prosecute any violator of the provisions of the Photographers' Law during the time the adjudication of the circuit court stands unreversed by a higher court.

In answer to your second question, I refer you to Section 478.07, Florida Statutes, 1941, which reads in part as follows:

"The board may adopt and enforce all rules and orders necessary to carry out the provisions of this chapter . . .

"The board may appoint, and, at its pleasure, remove any technical, legal or other assistant as may be necessary to carry out the provisions of this chapter and prescribe their powers and duties and fix their compensation."

Section 478.08, Florida Statutes, 1941, provides in part as follows:

"All expenses of administering this chapter shall be paid upon order of the board from the funds derived from the examinations, license fees and penalties prescribed in this chapter . . ."

It clearly appears from the above that it was the intent of the legislature that the board should be empowered to put the Photographers' Law into effect, to compel obedience thereof, to employ legal counsel and pay all expenses incident thereto. The power to employ counsel would be of no meaning if it did not include also the power to pay the cost of the litigation wherein said counsel is engaged on behalf of said board in the performance of its statutory powers and duties.

It is my opinion, therefore, that your second question should be answered in the affirmative.

December 7, 1945.—045-375.

STATE BOARD OF PHOTOGRAPHIC EXAMINERS— DISPOSITION OF AFFAIRS

QUESTION: What should be the disposition of the affairs of the State Board of Photographic Examiners, pursuant to the adjudication by the Supreme Court of Florida that Chapter 478, Florida Statutes, 1941, is invalid and unenforceable?

To Mr. Carl W. Blakeslee, Chairman, State Board of Photographic Examiners, Tampa, Florida:

In the case of Sullivan, Sheriff v. DeCerb, 23 So. (2) 571, the Supreme Court of Florida held the licensing requirements of Chapter 478, Florida Statutes, 1941 (being a codification of Chapter 19317, Laws of Florida, Acts of 1939), to be invalid and unenforceable. Said Chapter 478 com-

prising one entire scheme for the licensing of photographers in this state and having no other purpose, the manifest legislative purpose in the enactment of said chapter was defeated by the aforesaid adjudication, and the entire chapter must fall as unconstitutional and void from its inception. The State Board of Photographic Examiners having been created by said Chapter 478 was thereby declared never to have had a legal existence.

Your letter advises me that the board has now in its custody approximately two thousand five hundred dollars (\$2,500.00), which money was received by the board under the provisions of said Chapter 478. I presume that the board also has in its custody some personal property which it has purchased with funds received under the provisions of the said Chapter 478.

The answer to your question as stated above rest upon mixed and involved questions of law and of fact, and is of such a nature that it can only be appropriately determined by resort to the courts of this state.

For the protection of the members of the board, in the greatest measure, from personal liability to any person or persons who may desire to prosecute claims for refunds of fees involuntarily paid to the board, as well as for protection from such liability to the State of Florida, it is my opinion that the members of the board should bring a proper law suit to ascertain from a court of competent jurisdiction the answer to the question you have submitted to me. However, if the members of the board so desire, the attorney general of the state can, and will be glad to initiate such a suit.

MASSEURS AND MASSEUSES

May 30, 1946.—046-237.

QUALIFICATION—BEAUTICIAN—EMPLOYEES

QUESTIONS: 1. If a beautician duly licensed under the laws of this state, or other person who operates a mechanical apparatus for the purpose of administering reducing treatments to customers in a beauty shop or other establishment is such beautician or other person required to be registered as a masseur or masseuse under the provisions of the Massage Registration Law (Chapter 480, Florida Statutes, 1941)?

2. Is it permissible for a massage establishment wherein are operated from six to eleven tables to employ only one manager and two operators?
To Honorable Fred L. Terry, Secretary-Treasurer, Florida Board of Massage, Miami, Florida:

The following is predicated upon the assumption that the above described treatments include manipulating, rubbing, stroking, kneading, or tapping of the body of the person being treated, or hot and cold packs or cabinet baths, and that such treatments do not constitute fever therapy or tub, shower, sitz, or similar baths.

In my letter to your board under date of November 30, 1945, (opinion number 045-370) I advised that it is my opinion that beauticians duly licensed under the laws of this state are exempted by Section 480.03, Florida Statutes, 1941, from the provisions of the Massage Registration Law "only as to those activities which are performed in the course of the bona fide practice" of beauty culture. In said letter the same rule also applied to licensed barbers and to registered nurses, i.e. they are exempted from the provisions of said law only as to those activities performed in the bona fide practice of their respective professions. The same rule is to be applied to persons engaged in other professions exempted from said law by said Section 480.03. In the application of the above rule to individual situations it is a question of fact, for the Florida Board of Massage to determine, whether activities which amount to the practice of massage, as defined in Section 480.01 (1), Florida Statutes, 1941, are performed in the bona fide practice of an exempted profession.

The fact that an apparatus is entirely mechanical so that manual manipulation is unnecessary does not exempt the operation of such an apparatus from the licensing and other regulatory provisions of the Massage Registration Law. Said Section 480.01 (1) expressly includes mechanical apparatus within the definition of the practice of massage as contemplated by said laws.

In reply to the second question set forth above there is no limitation in the Massage Registration Law regarding the number of massage tables which may be lawfully operated by one masseur or masseuse. However, if the number of tables so operated were so great as to render the operator thereof unable to administer proper treatments to the customers, such masseur or masseuse would be subject to revocation, suspension or annulment of his or her certificate of registration under Section 480.11 (1) (f), Florida Statutes, 1941, if, in the opinion of the board, such fact rendered him or her incompetent or willfully negligent in the practice of massage.

I do not undertake to advise you upon the existence or effect of any municipal laws or regulations which might affect the answer to the second question, as applied to any particular municipality. The power of the municipal governments of this state to pass and enforce reasonable laws and regulations governing the practice of massage is preserved by Section 480.17, Florida Statutes, 1941.

December 8, 1945.—045-390.

MASSAGE REGISTRATION LAW—EXEMPTION OF CHIROPRACTOR

QUESTION: Is a person who is authorized by the laws of this state to practice chiropractic exempt from the licensing and other requirements of the Massage Registration Law (Section 480, Florida Statutes, 1941, as amended), if such person engages in activities which amount to the practice of massage as defined in said law, and publicly advertises that he so practices?

To: Mr. Paul Steele, Secretary-Treasurer, Florida Board of Massage, Miami Beach, Florida:

Under the rule laid down in my opinion rendered for you under date of November 30, 1945 (Opinion No. 045-370) relating to exemption of nurses, barbers and beauticians from the provisions of the Massage Registration Law, a chiropractor is subject to the provisions of said law if he engages in activities amounting to the practice of massage, not in the course of the bona fide practice of chiropractic or any branch thereof. In your application of that rule to chiropractors, it should be noted that the practice of chiropractic comprehends a broad overlapping into the field of massage. See Section 460.11, Florida Statutes 1941, defining "Chiropractic." It may be that the bona fide practice of chiropractic includes an even greater overlapping into the field of massage than is expressed in said Section 460.11. It is for the Florida Board of Massage to determine, in the light of the above, whether the practices of the chiropractor in question are performed in such a manner as to be exempt from the terms and provisions of the Massage Registration Law.

November 30, 1945.—045-370.

MASSAGE REGISTRATION LAW—PERSONS EXEMPT

QUESTION: Is a person who is a registered nurse or duly licensed barber or beautician under the laws of this state exempt from the licensing and other requirements of the Massage Registration Law (Chapter 480, Florida Statutes, 1941, as amended), if such person engages in activities which amount to the practice of massage as defined in said law?

To Mr. Paul Steele, Secretary-Treasurer, Florida Board of Massage, Miami Beach, Florida:

The Massage Registration Law comprises a scheme for the examination and licensing of masseurs and masseuses, for the inspection and registration of massage schools, and creates the Florida Board of Massage for the execution thereof. "Registered nurses under the laws of this state," "barbers duly licensed under the laws of this state," and "beauticians duly licensed under the laws of this state," are exempted therefrom by the express provisions of Section 480.03, Florida Statutes, 1941, as amended.

Manifestly, in enacting the Massage Registration Law, as a public health statute, the legislature recognized that it was impracticable to intermingle the regulation of nurses, barbers and beauticians, and designedly exempted such persons from the provisions of said law, because some of the recognized acts of "nursing," "barbering," and/or "beauty culture" amount to the "practice of massage" as that term is defined in said law. It was therefore the intention of the legislature, in incorporating such exemptions into said law, to exempt nurses, barbers, and beauticians from the licensing and other requirements of said law, only in so far as, and to the extent that the bona fide practice of their respective professions would overlap into the field comprehended by the Massage Registration Law. Compare *Brown v. Watson*, 116 Fla. 56, 156 So. 327, text 330-331.

It is therefore my opinion that registered nurses and duly licensed barbers and beauticians, in this state, who engage in activities amounting to the practice of massage, as that term is defined in the Massage Registration law, are exempt from the licensing and other requirements of said law only as to those activities which are performed in the course of the bona fide practice of their respective professions.

ADMINISTRATIVE BOARDS, GENERALLY

July 2, 1946.—046-283.

VETERAN—GRACE PERIOD—ACTIVE DUTY

QUESTION: "When does the grace period of six months for a qualified veteran commence under the provisions of Section 485.02, 1943 Supplement Florida Statutes, 1941?"

To Honorable George A. Pierce, Attorney for State Board of Funeral Directors, Jacksonville, Florida:

"Now or hereafter on active duty" is the language used in Chapter 21885, Laws of Florida, 1943, now Section 485.02, supra; those terms can only refer to and be determined by the date the chapter became a law, which was May 31, 1943. The said act, therefore, applies to those certain veterans who had not reverted to an inactive duty status nor had been discharged from active duty prior to May 31, 1943. For example: A veteran goes on a 92-day terminal leave, on March 1, 1943, dons civilian garb, engages in business, and from all appearances is discharged and released from military duty but in truth and in fact he is actually on active military duty up to midnight the 31st day of May, 1943, and, if otherwise qualified, comes within the benefits of the law. Terminal leave is only granted to commissioned officers but there is legislation pending in Congress to extend it to the men in the non-commissioned ranks.

The six months grace period commences to run from the day the veteran ceases to be in an active duty status.

February 20, 1946.—046-71.

VETERAN—OCCUPATIONAL LICENSE TAX

QUESTION: Does Section 485.02, 1943 Supplement to Florida Statutes, 1941, have the effect of exempting veterans who are within the pur-

view of that statute from the payment of occupational license taxes for a period of six months after their discharge from active duty as members of the armed forces of the United States?

To Honorable David L. Wiley, State Service Officer, St. Petersburg, Florida:

Section 485.01, 1943 Supplement to Florida Statutes, 1941, defines the term "administrative board of the State of Florida" and Section 485.02 provides as follows:

"Any member of the armed forces of the United States of America now or hereafter on active duty, who, at the time of his becoming such a member, was in good standing with any administrative board of the State of Florida and was entitled to practice or engage in his profession or vocation in the State of Florida, shall be kept in good standing by such administrative board of the State of Florida, without registering, paying dues or fees or performing any other act on his part to be performed, as long as he is a member of the armed forces of the United States of America on active duty and for a period of six months after his discharge from active duty as a member of the armed forces of the United States of America."

In my opinion of January 31, 1946, to the attorney for the State Board of Funeral Directors and Embalmers, a copy of which I attach, I held that the effect of Section 485.02 is to grant to all qualified veterans a grace period of six months after discharge during which they may practice their professions without the necessity of paying licenses such as the annual renewal fees required to be paid to the State Board of Funeral Directors and Embalmers by Section 470.10, Florida Statutes, 1941, as amended. The same holding is applicable to fees and dues payable to other "administrative boards of the State of Florida", as such boards are defined in Section 485.01.

It is the clear intent of Section 485.02 that its scope shall be limited to fees and dues of that character, so it can have no bearing upon the ordinary occupational license taxes assessed and collected for general state, county and municipal governmental purposes. Therefore, it is my opinion that your question should be answered in the negative.

July 1, 1946.—046-268.

TEMPORARY LICENSES—MEDICAL BOARD

QUESTION: In Gilchrist county there are suspected cases of poliomyelitis but there are at present in the county no doctors of medicine licensed to practice, although there are residing in Gilchrist county two former army physicians who have recently stood examinations before the State Board of Medical Examiners but have been instructed by the board to refrain from practicing medicine until it is determined that they have been successful in the examinations. May temporary licenses to practice medicine be issued to those two persons?

To Honorable Millard F. Caldwell, Governor:

Section 458.07, Florida Statutes, 1941, provides as follows:

"The secretary-treasurer of the board of medical examiners, with the approval of the president, may issue a temporary license to an applicant which shall have the same force and effect of a permanent license until the next regular meeting of the board, when said license shall become void. Said license shall not be recorded."

It is my opinion that the quoted section clearly grants to the secretary of the State Board of Medical Examiners, with the approval of the

president, the power to issue temporary licenses to practice medicine to the two gentlemen under consideration. Both are applicants for licenses and it must be presumed that both have met all requirements prescribed by law and the regulations of the board, except that it has not yet been determined whether they have been successful in the examinations already conducted by the board.

LABOR ORGANIZATIONS

December 5, 1946.—046-502.

BUSINESS AGENT LICENSE

* **QUESTIONS:** (1) Are business agents of labor unions, as defined in Section 2, Chapter 21968, Laws of Florida, Acts of 1943, required to obtain the license or permit provided by Section 4 of said Chapter 21968?

(2) Are labor organizations operating in this state required annually to make report to the secretary of state in the manner and as provided by Section 6 of said Chapter 21968?

To Honorable R. A. Gray, Secretary of State:

Sections 4 and 6 of said Chapter 21968 have been subjected to court construction. In 1943, the circuit court of Duval county, Florida, in the case of *State ex rel. Watson, Attorney General vs. Hill, et al.*, issued an injunction restraining a business agent, as contemplated by the first question above, to act as such agent for a labor union until he should have applied for and procured a business agent's license to act for such union, as required by Section 4 of said Chapter 21968; and restrained a labor organization from functioning as such until it should have complied with the provisions of Section 6 of said Chapter 21968. The business agent and the union appealed the case to the Supreme Court of Florida, which affirmed the lower court (see *Hill et al. vs. Watson, etc.*, 19 So. 2d. 857); and such appellants thereupon obtained review of the decision of our Supreme Court in the Supreme Court of the United States. The latter court modified the decision of the Supreme Court of Florida (see *Hill vs. Florida, ex rel. Watson*, 325 U.S. 538.89 L Ed. 1782) to the extent reflected in the amended final decree entered in the trial court as commented upon below.

In pursuance of the decision and mandate of the Supreme Court of the United States, and the modified order and mandate of the Supreme Court of Florida, on February 1, 1946, the circuit court of Duval county entered its amended final decree in said cause. The effect of such amended final decree is summarized as follows:

(1) The following wording was excised from Section 4 of said Chapter 21968: "and are of the opinion that the public interest requires that a license or permit should be issued to such applicant."

(2) That the provisions of Section 4 of said Chapter 21968, with the noted excision, were and are valid and enforceable provisions of law; and that a person must apply for and obtain the license or permit, as provided by said Section 4, before he can engage in the activities of a business agent for a labor union as such agent is defined in Section 2 of said Chapter 21968, such activities being particularly enumerated as follows:

(a) Acting or attempting to act for a labor organization in the issuance of membership or authorization cards, work permits, or any other evidence of rights granted or claimed in or by a labor organization; and

(b) Acting or attempting to act for a labor organization in soliciting or receiving from an employer any right or privilege for the members, or any number of the members, of a labor organi-

zation who are employees of such employer, subject to the exception contained in the succeeding paragraph; it being understood that the collective bargaining representative of the members of a labor organization, under the National Labor Relations Act, and engaged solely in such activity as such agent, is not a "business agent" as the same is defined in said Chapter 21968.

(3) Labor organizations, upon failure to comply with Section 6 of said Chapter 21968, cannot be enjoined from functioning solely with respect to collective bargaining under the National Labor Relations Act; but as to all other functions and activities of a labor organization, the provisions of said Section 6 are valid and enforceable.

In view of the foregoing, in my opinion the above questions properly are answered as follows:

A. "Business agents" of labor organizations, as such quoted words are defined in Section 2 of said Chapter 21968, to function as such are required to apply for and procure the license or permit provided by Section 4 of said Chapter 21968; it being understood, as mentioned above, that the collective bargaining representative of members of a labor organization, under the National Labor Relations Act, engaged solely in such activity, as such agent, is not a "business agent" as defined in said Chapter 21968.

B. In view of the purposes, functions and activities of labor organizations, all such organizations in Florida must comply with the provisions of Section 6 of said Chapter 21968.

CHAPTER XXVII

REGULATION OF TRADE, COMMERCE AND INVESTMENTS

FOOD, DRUGS AND COSMETICS

January 4, 1946.—046-2.

DANGEROUS DRUGS—PRESCRIPTION AND SALE

QUESTION: Is it lawful for members of the osteopathic, naturopathic or veterinary professions to prescribe the dangerous drugs named in Section 500.15 (11) as amended by Chapter 22927, Laws of 1945?

To Dr. P. A. Foote, Director, Bureau of Professional Relations School of Pharmacy, Gainesville, Florida:

In several opinions I have held as follows:

1. Naturopaths may not prescribe drugs. (They are authorized to practice phytotherapy and they may therefore prescribe natural juices of plants or teas brewed from plants, but not drugs compounded or otherwise prepared from the plants).
2. Osteopaths may not prescribe drugs which are not taught in standard colleges or schools of osteopathy, but may prescribe such drugs as are so taught.
3. Veterinarians are authorized to prescribe drugs, including narcotics, but only for animals.

The question now presented is whether the amendment of Section 500.15 (11) by the 1945 legislature requires a different answer. The amended section reads as follows:

"If it is a drug sold at retail, and contains any quantity of aminopyrine, any barbiturate, cinchophen, dinitrophenol, penicillin or sulfanilamide or any of their chemical derivatives or combinations; unless it is sold on a written prescription signed by a member of the medical, dental, osteopathic, naturopathic or veterinary profession who is licensed by law to administer such drugs, and its label bears the name and place of business of the seller, the serial number and date of such prescription and the name of such member of the medical, dental, osteopathic, naturopathic or veterinary profession. Prescriptions for drugs which have been, or may hereafter be, declared 'Dangerous or habit forming' by the Federal Food and Drug Administration or the Commissioner of Agriculture of the State of Florida may be refilled by Florida licensed pharmacists who shall make a record of such refilled prescriptions as shall be provided by regulation. If marked 'non-Repeat' or 'N. R.' the pharmacist shall not refill."

It will be noted that the amendment substituted the words "medical, dental, osteopathic, naturopathic or veterinary profession" for the words "medical, dental or veterinary profession." The section is a part of the Foods, Drugs and Cosmetics Law. That law prohibits the manufacture, sale, delivery or offering for sale of certain foods, drugs and cosmetics, including "misbranded drugs." Section 500.15 (11) defines one of the numerous kinds of "misbranded drugs." The amended statute still requires any member of the named professions to be licensed by law to

administer such drugs. There is nothing in the amendment which purports to license any one to administer the drugs; we must look to other statutes to determine what professional persons are licensed to administer these drugs. There have been no changes in the statutes in that respect and therefore the several opinions as to members of the naturopathic, osteopathic and veterinary profession as set out above still hold.

August 7, 1945.—045-226.

LICENSE TO ADMINISTER DRUGS

QUESTION: By the language of Section 500.15, Florida Statutes, 1941, as amended by Chapter 22927, Acts of 1945, which states that drugs containing certain identified chemicals if sold at retail are deemed misbranded, unless sold on written prescription of a member of the medical, dental, osteopathic, naturopathic or veterinary profession who is licensed by law to administer such drugs, did the legislature intend that the profession should be licensed under Florida law?

To Honorable Nathan Mayo, Commissioner of Agriculture:

It is believed that the legislature designed the term "licensed by law" to apply only to licensees of this state, for otherwise, when it was apparent that the prescription was prepared by an out-of-state practitioner, it would require the perhaps difficult burden of ascertaining whether or not said practitioner was properly licensed to write the prescription, and I do not think that the legislature so intended this burden to be undertaken in the enforcement of the Florida Food, Drug and Cosmetic Law.

It is also remembered that in some instances professions which are licensed in Florida are not licensed in other states; or, if licensed, the regulations do not meet the standards prevailing in this state and, it being presumed that the legislature purposed that anyone who signed such a prescription should be possessed of a license equivalent to the requirements existing in this state, a further ascertainment would be necessary to determine first, if the profession was licensed in another state or, second, if requirements of the two states were on a parity.

For these reasons it is my belief that the legislature intended that such written prescription should be signed by a member of one of the named professions licensed by Florida law.

MILK, CREAM AND MILK PRODUCTS

August 29, 1945.—045-271.

GRADES OF MILK—PUBLICATION IN LOCAL NEWSPAPER

QUESTION: May a director of a county health unit, as the duly authorized representative, in a particular county, of the health officer of the State of Florida, publish in a paper of such county the grades of milk and milk products delivered by producers or distributors in said county to ultimate consumers, as contemplated by Section 7, Chapter XI, Florida State Sanitary Code?

To Dr. F. M. Hall, Director, Department of Public Health, Jacksonville, Florida:

Section 7 of said Chapter XI requires the health officer, at least once every six months, to "announce the grades of all milk and milk products delivered by all producers or distributors and ultimately consumed within the State of Florida."

Section 1 (r) of said Chapter XI defines "health officer" as "the health officer of the State of Florida, or his duly authorized representa-

tive." It would seem that the director of a county health unit properly could be the duly authorized representative of the state health officer within the meaning of said definition.

In view of the foregoing, in my opinion the above question properly is answered as follows:

Under the provisions of Section 7, Chapter XI, Florida State Sanitary Code, said county health officer may publish such grades of milk and milk products in the manner contemplated by such question. However, any such publication should be in pursuance of the order or direction of the state health officer.

HOTEL COMMISSION

September 24, 1946.—046-409.

REFUSAL TO ISSUE LICENSE—INSPECTION

QUESTIONS: "Question 1. Does the State Hotel Commission have the legal right to refuse to issue a license to any establishment until said establishment has first been inspected and found to comply with the requirements of the law?

"Question 2. Does the State Hotel Commission have the legal right to refuse to issue a license for the new fiscal year or reinstate a current license, which has been revoked, until such a time as said establishment has been inspected and found to comply with the law?"

To Honorable J. Lee Ballard, State Hotel Commissioner:

The law requires that those certain establishments, that come within your jurisdiction, shall meet the requirements of the law and your valid rules and regulations in order for them to operate legally. The law contemplates that those certain establishments that do meet all the requirements aforesaid shall be duly issued the appropriate license and that you shall issue such license without undue delay. However, you should never issue the appropriate license to operate one of the aforesaid establishments if you are not satisfied that they have met the requirements of the law and your valid rules and regulations. It would be a most strained construction of Chapters 509 and 511, Florida Statutes, 1941, to hold that even though you knew the applicant was about to commence operation in violation of the law you would nevertheless be compelled to issue the appropriate license because this would be requiring a futile thing to be done, for example: assume that the applicant is about to operate a hotel and you know that the elevator shafts therein do not comply with the requirements of Section 511.22, Florida Statutes, 1941, but on the contrary is a veritable firetrap. Surely you should withhold the issuance of the license as your issuing it would immediately put the obligation and duty on you to take steps to revoke it. In other words, you should not issue the appropriate license to an applicant if you know the establishment does not meet the requirements of the law and your valid rules and regulations; if you have good reason to believe that the applicant is not complying with all necessary requirements you would be authorized to withhold the issuance of the appropriate license pending your timely inspection. Also, as to those establishments against whom you have revoked their licenses, you should not reinstate the license nor issue them a new license for the coming fiscal year until such violations have been corrected.

May 6, 1946.—046-201.

HOTEL—DEFINITION

QUESTION: "Is the term 'hotel' governed by the definition as found in Section 510.01 or Section 511.01, Florida Statutes, 1941?"

To Honorable J. Lee Ballard, Hotel Commissioner:

When we consider the history of Chapters 509, 510 and 511, Florida Statutes, 1941, and each and every section thereof, we find that the major portion of each of said chapters was derived from Chapter 16042, Laws of Florida, Acts of 1933. We also find that all sections of Chapter 510, Florida Statutes, 1941, except Section 510.01, were derived from said Chapter 16042. Section 511.01, Florida Statutes, 1941, was derived from and is substantially the same as Section 6, Chapter 16042, Laws of Florida, Acts of 1933, which was substantially the same as Section 3, Chapter 6952, Laws of Florida, Acts of 1915. Sections 510.01 and 511.42, Florida Statutes, 1941, are the only sections in Chapters 509, 510 and 511, Florida Statutes, 1941, which were not directly affected by the definitions in said Sections 3 and 6 of the 1915 and 1933 acts above mentioned at the time of the adoption of the statutes. The definition in Section 510.01 does not seem to be broad enough to embrace the subject matter expressed in Sections 510.02, 510.04 and 510.06 therein contained.

"As statute incorporated into a code is presumed to be incorporated without change even though it is reworded and rephrased and in the organization of the code its original sections are separated. Where, however, the legislative intent is clear that a change in the law is intended, the new provision prevails. In case of ambiguity it is permissible to resort to the prior legislative history of the act, the form and language of the prior statute, prior interpretation and all matters in *pari materia* in order to arrive at the true meaning of the code provision." (2 Sutherland Statutory Construction, 3rd. Ed., 255, Section 3709). In construing a codification of existing laws it should be presumed that no substantial change was intended, in the absence of positive evidence of an intent to change the law. (59 C. J. 1099, Section 648). If there is any conflict between two sections of a statute or code, the one which was derived from the older law will fall and the one derived from the subsequent law will govern. (Hillsborough County v. Jackson, 58 Fla. 210, 50 So. 423 and Lykes Bros. Inc. v. Bigby, 155 Fla. 580, 21 So. 2d. 37).

When the above statutes, laws and authorities are considered together, it seems clear that Section 511.01, Florida Statutes, 1941, is the governing definition as to what constitutes a hotel under Chapters 509, 510 and 511, Florida Statutes, 1941, and not Section 510.01.

HOTELS

October 25, 1946.—046-441.

EVICITION OF TENANTS—CONFLICT WITH OPA

QUESTION: Does the Office of Price Administration through its area rent control offices within the State of Florida have any legal right to require a landlord in the State of Florida to establish grounds upon which federal law will permit said landlord to remove or evict tenants who are violating the provisions of Chapter 510, Section 510.08, Laws of Florida, before said violators can be evicted?

To Honorable J. Lee Ballard, State Hotel Commissioner:

Chapter 22023, Laws of Florida, 1943, re-enacted as Section 510.08, Florida Statutes, 1941, is a statute penal in its nature, condemning certain prescribed conduct on the part of hotel or apartment house guests as a misdemeanor and providing a penalty for the commission of certain acts as a breach of the peace. The statute further directs the arrest of offending guests by peace officers and their summary eviction from the hotel or apartment house premises. There is nothing in the provision of the Act of Congress creating the federal agency known as "Office of Price Administration" which would indicate an intention on the part of Congress to cause a cloak of protection to be cast around a

miscreant guilty of a violation of the criminal laws of the state and absolve him from arrests and punishment without first securing the consent of the federal authorities to his apprehension. Any such exercise of statutory or rule making power would not be justified under organic law.

Your question is therefore answered in the negative; that is, that in all cases where a person who is a guest of a hotel, apartment house or other establishment described in the act of the legislature under consideration, violates the provisions of the statute referred to, he may be summarily evicted, with or without the assistance of a peace officer, without first obtaining the consent of the federal authorities employed in the administration of "Office of Price Administration."

January 14, 1946.—046-15.

UNDESIRABLE GUESTS—EJECTION

QUESTION: Is Chapter 22023, Laws of Florida, 1943, providing for ejection of undesirable guests by hotels, apartment houses and like enterprises a constitutional enactment?

To Honorable J. Lee Ballard, State Hotel Commissioner:

Chapter 22023, Laws of Florida, 1943, constitutes and is a statutory declaration of the common law governing the relationship existing between innkeepers and guests. A strict compliance with the provisions of the statute by an innkeeper would not constitute deprivation of a guest of his liberty or property without due process.

It is competent for hotel keepers to enforce rules for the maintenance of order within the hotel, and if a guest is guilty of misconduct which is offensive to other guests or which would bring the hotel into disrepute, the hotel keeper may cause the removal of the guest, using only such means or force as is reasonably necessary to accomplish the purpose. It must be understood, however, that resort to the provisions of the statute is justified only under conditions that fall within the scope of the provisions of the act, which does not authorize or justify the exercise by the hotel keeper of arbitrary or unreasonable authority.

April 16, 1946.—046-149.

GUESTS—EVICTION AS UNDESIRABLE

QUESTION: What is the lawful procedure to be followed by a manager, or other person in charge or authority of a hotel or an apartment or rooming house, in the eviction of a guest who has in such hotel, apartment or rooming house become intoxicated or whose conduct has become immoral or who is profane and lewd or whose continued guest status would, in the opinion of such manager or person, be detrimental to such hotel, apartment or rooming house?

To Honorable J. Lee Ballard, State Hotel Commissioner:

My answer to your question is that such manager or person in authority should (1) notify such guest orally or in writing, preferably the latter, to the following effect: "You are hereby notified that this establishment no longer desires to retain you as its guest and you are requested to leave at once and to remain after receipt of this notice is a misdemeanor under the laws of this state," and at the same time tendering any unused portion of payment made in advance; (2) afford the guests a reasonable time within which to depart; (3) upon failure of the guest to abide by the notice, the manager or such person in authority may use only such force as is necessary to eject such guest or any policeman, constable, deputy sheriff, sheriff or other law enforcement officer of this state may

be called upon to eject such guest; (4) the manager or person in authority would be authorized to secure the door of the hotel room, apartment or room in the rooming house to prevent such guest from reentering same. The baggage should be delivered to the guest at the time of the eviction if not held as security for an unpaid bill.

My reason for so ruling is because of (1) the provisions of Section 510.08, Florida Statutes, 1941, and (2) at common law there is an implied contract between the innkeeper and his guest. It is implied that the innkeeper and his servants will exercise reasonable care for the safety, convenience and comfort of the guest and that the guest on his part will observe the recognized proprieties of life and refrain from any conduct offensive to other guests or which would bring the hotel into disrepute. (*Holden v. Carraher, et al.*, 81 N. E. 261; *Lehman v. E. J. Hines and Company*, 127 Pac. 612).

I invite your attention to the fact that my opinion is applicable to "guests" as distinguished from "boarder", "lodger", and "tenant".

HOTELS, RESTAURANTS, APARTMENTS; REGULATIONS

March 30, 1945.—045-84.

APARTMENT HOUSE—DEFINITION

QUESTION: Is a twelve-room house, formerly licensed as a rooming house, later divided into four units of three rooms each, with one toilet on each floor for the people to use jointly for living accommodations, with no rooms furnished, to be licensed as a rooming house or an apartment house under Section 511.01, Florida Statutes, 1941?

To Honorable Thomas A. Johnson, Commissioner, State Hotel Commission:

Section 511.01, Florida Statutes, 1941, provides as follows:

"Any building or part thereof, where separate accommodations for more than two families, **living independently of each other** are supplied to transient or permanent guests or tenants, shall be termed an apartment house and upon proper application, the hotel commission shall issue to such above described business a license to conduct an apartment house." (Emphasis supplied).

The controlling factor in answering the question presented by you seems to be the language I have emphasized. The fact that only one toilet is provided on each floor for the use by all the tenants on that floor would indicate that the families occupying the several units are not "living independently of each other," to such an extent as to make the building an apartment house.

Section 511.01, Florida Statutes, 1941, which provides that "Every house . . . held out to the public to be a place where living quarters, sleeping or housekeeping accommodations are supplied . . . shall . . . be deemed a rooming house," seems to more closely fit the situation you describe in your question.

I am, therefore, of the opinion that said building should be licensed as a rooming house under Section 511.01, Florida Statutes, 1941.

February 7, 1946.—046-51.

RESTAURANT DEFINED

QUESTION: Is a place such as a service station, theatre, drug store, selling wrapped sandwiches only, to be defined as a restaurant and subject to a license issued by the State Hotel Commission?

To Honorable J. Lee Ballard, State Hotel Commissioner:

Section 511.02, Florida Statutes, 1941, defines a restaurant, for the purposes of the quoted chapter, to be "every building or other structure . . . held out to the public to be a place where meals, lunches or sandwiches are prepared or served . . ." Your question is understood to indicate stores and other establishments engaged in the conduct of a mercantile business in connection with but not as the main purpose of which wrapped sandwiches are sold in the original package, just as any other article of merchandise is sold, but in which place of business no accommodations or facilities are offered or furnished for the consumption of sandwiches on the premises. The words of the statute "are prepared or served" would seem to indicate a legislative intention that something more than the mere sale of a sandwich in its original package was intended to bring the establishment within the statutory definition. The word "served" has a much more comprehensive meaning when applied to the sale of food products than the word "sold". The legislative intent is further indicated by the fact that Section 511.08 fixes the license fee upon a sliding scale from which the amount of the fee is determined by the accommodations provided for increasing numbers of persons. This would seem to indicate that in order that an establishment should come within the statutory definition of a restaurant, the sandwiches sold are served for the purpose of consumption on the premises. To construe the statute to mean that the mere sale of a sandwich would bring the place of business within the statutory definition of a restaurant, it would apply to all edible confections prepared or made in the form of a sandwich.

It is my opinion that Chapter 511 applies only to business establishments which not only sell but also serve sandwiches as an article of food and provide accommodation for their consumption under the premises by way of seats, tables and other facilities usually provided for eating purposes. Your question accordingly is answered in the negative.

January 10, 1945.—045-1.

HOTEL COMMISSION—ROOMING HOUSES; LICENSES

QUESTION: When eight separate houses, each containing four rooms, exclusive of the bathroom, are constructed on five acres of land, and each of such houses is furnished except for bed linens and lights and is rented by the month, must such structures be licensed as rooming houses?

To Honorable Thomas A. Johnson, Commissioner, State Hotel Commission:

The definition of a rooming house as given in Section 511.01, Florida Statutes, 1941, at first glance might appear to cover the structures referred to above, but if such is the case, it is inescapable that all houses furnished and rented as those described in the question would fall within the purview of such section. It is my belief that this would be a strained construction of the statute and one which was never intended by the legislature. Therefore, it is my opinion that your inquiry must be answered in the negative.

TOURIST CAMPS

September 9, 1946.—046-390.

JURISDICTION—LICENSING—STATE HOTEL COMMISSION

QUESTIONS: 1. Is the hotel commission authorized by statute, rule or regulation to require the securing of a permit as a condition precedent to the establishment or maintenance of a tourist camp?

2. How should tents or tent house employed in connection with the operation of a tourist camp be classified by the hotel commission for the purpose of imposing license fees?

To Honorable J. Lee Ballard, Commissioner, State Hotel Commission:

Section 513.01, Florida Statutes, 1941, defines a tourist camp as a place where two or more tents, tent houses or camp cottages are located and offered by a person or municipality for sleeping or eating accommodations. Chapter 513, Florida Statutes, 1941, having its origin in Chapter 19365, Laws of 1935, deals with the maintenance and establishment of tourist camps. Section 513.02 of that chapter provides that no tourist camp may be established or maintained without first obtaining a permit therefor from the State Board of Health. Section 513.03 provides for the form of application for permit and its contents. The chapter further provides for the issuance of the permit and the general supervision of the operation of the camps by the State Board of Health. There is no provision of law requiring or authorizing the hotel commission to issue a permit for the construction, establishment or maintenance of a trailer camp. The State Hotel Commission is governed by the provisions of Chapter 509, Florida Statutes, 1941, providing for the appointment of a commissioner and authorizing the commissioner to make such rules and regulations as are necessary to carry out the provisions of the cited chapter in accordance with its true intent. Under this authorization the commissioner is not empowered to make or enforce rules and regulations beyond the scope of the chapter authorizing his appointment. Accordingly, Rule 1702 to which you refer in your letter of August 26 in so far as it is intended to regulate the establishment or construction of tourist camps, would appear to be unauthorized. The provisions of Chapter 513, Florida Statutes, 1941, define a tourist camp as a place where two or more tent houses are located. That part of Rule 1702 directing that a tourist camp containing three or more tent houses prior to construction shall first receive the approval of the Florida State Board of Health is inoperative.

The provisions of Chapter 511, Florida Statutes, 1941, govern the licensing by the hotel commission of hotels, apartment houses and rooming houses. The definition of rooming . . . is "every house, boat, vehicle or other structure . . . used, maintained, advertised or held out to the public to be a place where living quarters, sleeping or housekeeping accommodations are supplied for pay to transient or permanent guests or tenants, whether in one or adjoining buildings, shall be deemed a rooming house." Section 511.06 classifies rooming houses for the purpose of imposing license fee based upon the number of rooms made available for accommodations. Section 511.01 authorizes the imposition of a license tax or fee by the hotel commissioner only for the purpose of conducting a rooming house after the same has been constructed and put into use. Tent houses and tent colonies, therefore, for the purpose of imposing license fee shall be classified as rooming houses and subject to the license fee based upon the number of available rooms within each house.

SECURITIES

August 8, 1946.—046-342.

COMMON STOCK SALE—REGULATION

QUESTION: If the Florida holders of preferred stock in a North Carolina corporation exercise their option to convert such stock into common stock of said corporation under the conditions hereinafter set forth, can the Florida Securities Commission require such common stock to be registered with it before such conversion can be made?

To Honorable J. M. Lee, State Comptroller:

It is my understanding that the preferred stock in the above corporation is registered with the Florida Securities Commission and that the

certificates evidencing the ownership of such stock provide that the holders thereof have the right and option, upon written demand made upon the corporation and upon the surrender of said certificates to the corporation at its office in North Carolina, to convert such preferred stock into a stipulated number of shares of the common stock of the corporation and that upon such written demand and surrender the corporation is bound to issue and deliver such common stock to the holders of the preferred stock; that the corporation will make no solicitation whatsoever in Florida of the holders of the preferred stock in regard to such conversion right and option; that if the option to convert is taken up by the Florida holders of preferred stock, they will give the required notice and surrender their preferred stock certificates by mail to the corporation at its office in North Carolina and the corporation will issue the common stock certificates in North Carolina and forward the same by mail to the holders in Florida; and that neither the preferred stock or the common stock nor the transaction in question is exempt under Chapter 517, Florida Statutes, 1941, as amended.

Assuming that my understanding of the facts as given is correct, and based thereon, it appears that said transaction is a sale under Section 517.02 of the aforesaid statutes; however, it also seems that the sale would take place in the state of North Carolina and not in Florida, for which reason the common stock of the corporation would not have to be registered with the Florida Securities Commission before the conversion privilege can be exercised.

It should be stated that this opinion is founded entirely upon the facts contained in the question propounded and reflected by the first paragraph hereof and that it is limited to such facts.

August 6, 1946.—046-346.

EXEMPT TRANSACTION—PERMIT

QUESTION: Where two persons in organizing and associating themselves together to transact business under a "declaration of trust" pursuant to Chapter 609, Florida Statutes, 1941, give the Florida Securities Commission written notice on the form prescribed by the commission revealing that prior to the time said "trust" becomes effective such persons propose to sell not exceeding twenty-five subscriptions to units of said "trust" and that no expense will be incurred and no commission, compensation or remuneration will be paid or given in connection with the sale or disposition of such subscriptions, is the sale of such securities an exempt transaction under Section 517.06(10) of said Statutes?

To Honorable J. M. Lee, Chairman, Florida Securities Commission:

Section 517.06 specifies that "Except as expressly provided, the provisions of the chapter shall **not** apply to the sale of any security in any of the following transactions:" including

"(10) Not exceeding twenty-five subscriptions for shares of the capital stock of a corporation prior to the incorporation thereof under the laws of this state when no expense is incurred, or no commission, compensation or remuneration is paid or given for or in connection with the sale or disposition of such securities."

The aforesaid attachment claims an exemption for the sale of the subscriptions in question based upon Section 609.05, which requires that none of the securities defined therein under a "declaration of trust" can be offered for sale before there has been procured from the commission **a permit to offer for sale and sell such securities and this permit must be applied for and granted under the same conditions as similar permits are applied for and granted corporations.** A careful examination of the wording of the latter section in the light of the provisions of the Uniform Sale of Securities Law (Chapter 517, Florida Statutes, 1941, as amended)

and particularly Section 517.05 to 517.09, inclusive, thereof, seems not to bear out such claim or, at the least, casts doubt over its correctness. For instance, **no permission** is required for a corporation to offer for sale or sell its securities in transactions which are exempt by virtue of Section 517.06 (10) as the Uniform Sale of Securities Law does not apply to such transactions; permission for a corporation to offer for sale or sell its securities is necessary only where such securities are **not exempt** or the transactions in which the sales are made are **not exempt**.

But we can not determine the question upon an examination limited to Section 609.05. We must look to the whole of Chapter 609, Section 609.04 of which provides that:

"No person may transact or conduct any business within this state, under any 'declaration of trust,' or like association, without first complying with the provisions and requirements of this chapter, and no person organized to do business under any such 'declaration of trust,' may offer for sale, barter or exchange any unit, share, contract, note, bond, mortgage, oil or mineral lease or other security of such organization or association, without first having complied with the provisions and requirements of this chapter." (Emphasis supplied)

It is quite clear from the last quoted section that no person can offer for sale in Florida any security under a "declaration of trust" "without first" having satisfied the provisions of Chapter 609. Among such provisions are those of Section 609.03, which read:

"Upon the filing of the copy of the 'declaration of trust' and the payment of the filing fee, . . . the secretary of state shall issue to the trustees named in the said 'declaration of trust' a certificate showing that such 'declaration of trust' has been duly filed in his office; whereupon, such association shall be authorized to transact business in this state; provided that all other applicable laws have been complied with."

It seems that the "declaration of trust" is not effective until the secretary of state has issued his certificate as required by the latter section. This being true, the persons organizing the "declaration of trust" have no legal authority to offer for sale any security of such "trust" until said certificate "first" has been issued. It follows as an inescapable consequence that the sale of the subscriptions under discussion would not be exempt under Section 517.06 (10).

August 17, 1946.—046-349.

INVESTOR'S BOOKLET—DEALER

QUESTIONS: If compensation is received by Holm Market-Gram, Inc. for the bulletins described in the aforesaid booklet and the bulletins are issued for the purposes indicated by said booklet, is such corporation a "Dealer" within the meaning of Section 517.02 (4), Florida Statutes, as amended?

To Honorable J. M. Lee, Chairman, Florida Securities Commission:

Section 517.02 (4) provides that a

"Dealer" shall include 'Investment Adviser' and 'Investment Counsel' and 'Investment Counsellor' which is hereby defined to be every person who in this state for compensation engages in the business of advising others either directly or indirectly or through publications or writings as to the value of securities, or as to the advisability of investment in or purchasing securities, and every person other than a certified public accountant who issues or promulgates analyses or issues reports concerning securities; . . ."

The booklet is entitled "THE SERVICE FOR INVESTORS" and it begins on the very first page with an announcement:

"TO THE INVESTOR:

This booklet is directed to you with the sole purpose of pointing out the means of making investments in various securities. Also to familiarize you with the service HOLM MARKET-GRAM, Inc. renders in your stock market dealings. It is needless to mention here the years of study and research which has been put into the method used in forecasting future market trends found in this booklet.

Please read and study each bulletin in coordination with the chart found on page 30 in this booklet. You will also note a list of stocks that follow The New Times Average of 50 Stocks on this page. This is the Average used by HOLM MARKET GRAM, Inc. in forecasting future trends of the market in general.

There is nothing so disturbing as not knowing what and when to buy and sell, when to get into the Market and when to get out.

LET HOLM MARKET-GRAM, Inc. SOLVE YOUR MARKET PROBLEMS."

Thereafter appears a number of bulletins, beginning with Bulletin No. 1 on August 14, 1937, and ending with Bulletin No. 48 on February 2, 1946, and including several denominated "EXTRA." These bulletins gave the New York Times average of fifty stocks. They occasionally suggested patience but primarily they forecasted a rally, a drop, a sharp rally, a fairly good rally, or a reaction and the "possible" averages that would be attained by such forecasted changes in the market. These bulletins were unflinchingly accurate and the market rose or fell in each instance to the exact figure forecasted as the "average."

On page 30 of the booklet it is stated:

"Here is a group of Stocks that are listed on the New York Stock Exchange which follow the movements of the N. Y. Times Averages of 50 Stocks in close harmony. It must be borne in mind that when a stock falls in its ability to 'go' with the Averages it should be replaced by one with more responsiveness with the Averages."

after which are named 30 stocks beginning with "Air Reduction" and ending with "Woolworth (F.W.)."

On pages 32 and 34 of the booklet we find the following:

"Now that you have read and studied each and every Bulletin and compared them with the Minor and Major trends on the chart it is obvious that HOLM MARKET-GRAM, Inc. can and will solve your investment problems.

The manner in which you, as a Subscriber, will gain from this service is as follows:

When a major trend, either on an advance or decline, has terminated or is about to terminate you will receive a bulletin similar to the ones you have just surveyed in ample time to reverse your position. This same bulletin announcing a change of position applies to the minor trends of rallies or reactions of short duration. The extra bulletins are sent to you at no additional cost.

Here is the one important point HOLM MARKET-GRAM, Inc. wishes you to absorb above all else in this booklet. Even tho

you are not interested in taking advantage of the reactions of the market but only on the long term holding position, ASK YOURSELF THIS QUESTION:—'Is this service worth \$100.00 to me to know, well in advance, that the bull market has reached its highest point and that it is time for me to get out with a good profit?' Here is still another question to ask yourself: 'Is this service worth \$100.00 to me to know in advance, that a bear market has reached the bottom and that it is time for me to buy stock with a feeling of security and confidence?'

LET HOLM MARKET-GRAM, Inc. ANSWER THESE QUESTIONS FOR YOU.

In the back of the booklet is the subscription blank covering the service for a period of one year.

I have observed the statement appearing as a "NOTE" at the bottom of the back of the first page of the booklet (a most inconspicuous place for such a statement, incidentally) that Holm Market-Gram, Inc. does not "advise anyone to make commitments either in buying or selling any Stocks or Bonds" and also the claim made in one of the letters in your file that the corporation is not an investment advisor or investment counsellor because the booklet "does not advise the purchase of any securities and makes no suggestion of sale or purchase." Obviously, this "NOTE" and claim are not determinative of your inquiry.

Because of limited space it is impossible to set forth everything in the booklet but what has been quoted and stated above is indicative of its contents, which, when considered in whole, amply support the view that if bulletins of the nature described are issued for compensation for the purposes disclosed by the booklet, the corporation will thereby bring itself within the definition of a "Dealer" as quoted herein; therefore, it is my opinion that your question is properly answered in the affirmative.

June 19, 1946.—046-265.

FOREIGN CORPORATION—REGISTRATION

QUESTION: Where a Tennessee corporation registered as a dealer in securities in Florida transfers and conveys its entire business and assets to a new corporation organized under the laws of Delaware, not registered as such a dealer in Florida, and the latter corporation states that the only changes contemplated are (1) the state of incorporation and (2) an increase in capitalization, is it necessary for the new corporation to comply with Section 517.12, Florida Statutes, 1941?

To Honorable J. M. Lee, Chairman, Florida Securities Commission:

In the first place, the changes actually resulting from the creation of the Delaware corporation are shown by the facts of your question to go far beyond the contemplated changes of stated by such corporation. For instance, there has not been just a change in the state of incorporation; there has been organized in Delaware an entirely new corporate entity, different and distinct from the one previously incorporated under the laws of Tennessee.

Section 517.12 provides, among other things, that

"No dealer . . . shall engage in business in this State as such dealer . . . or sell any securities including securities exempted in Section 517.05, . . . unless he has been registered as a dealer . . . in the office of the Commission pursuant to the provisions of this section."

that

"An application for registration in writing shall be filed in the office of the commission in such form as the commission may prescribe, duly verified by oath . . ."

setting forth certain requisite information, and that

"If the commission shall find that the applicant is of good repute and has complied with the provisions of this section . . . they shall register such applicant as a dealer . . ."

It seems clear from the above section that the determination by the commission of the "good repute" of each applicant and compliance with the other provisions of such section are anterior requirements to becoming a dealer in Florida. Such requirements can be met only by adhering to and following the provisions of such section; consequently, your question is answered in the affirmative.

May 8, 1946.—046-194.

REGISTRATION—PERIOD OF NET EARNINGS

QUESTION: During what period of years should average annual net earnings be shown in registration statements filed under Section 517.08(1), Florida Statutes, 1941, as amended?

To Honorable J. M. Lee, Chairman, Florida Securities Commission:

Included in the securities entitled to registration by notification under Section 517.08(1) are those

" . . . issued by a corporation, partnership, association, company, syndicate or trust owning a property, business or industry which has been in continuous operation not less than three years and which has shown during a period of not less than two years or more than ten years next prior to the close of its last fiscal year preceding the offering of such securities, average annual net earnings . . ." (emphasis supplied)

as required by such section.

Subsection (9) of Section 517.08 provides that securities entitled to registration by notification shall be registered by filing in the office of the commission a statement with respect to such securities containing, among other things,

"(d) A brief statement of the facts which show that the security falls within one of the classes in this section defined.

"In the case of securities falling within the class defined by subsections (1) . . . , a copy of the circular to be used for the public offering shall be filed in the office of the Commission with the statement . . ."

Also included in the last mentioned subsection is the following:

"If at any time in the opinion of the Commission, the information contained in the statement or circular filed is or has become . . . , inadequate or incomplete, or the sale or offering for sale of the security may work or tend to work a fraud, the Commission may require from the person filing such statement such further information as may in its judgment be necessary to establish the classification of such security as claimed in said statement or to enable the Commission to ascertain whether the registration of such security should be revoked on any ground specified in section 517.11 . . ." (Emphasis supplied)

Section 517.11 provides that

"The commission may revoke the registration of any security by entering an order to that effect, with its findings in respect thereto, if upon examination into the affairs of the issuer of such security it shall appear that the issuer:

- (1) is insolvent; . . .
- (7) has its affairs in an unsound condition;
- (8) has not based the enterprise or business or the security upon sound business principle . . ."

In *McElfresh v. State*, 9 So. (2d), 277, the Supreme Court of Florida said respecting the Uniform Sale of Securities Law, of which the aforesaid sections are a part, the following:

"Statutes of this character are upheld under the police power of the state. Their purpose is to protect the public against fraud and the statute will be given a broad and liberal interpretation to effectuate the purpose."

With respect to the aforesaid law our Supreme Court also said in *State v. Hemphill*, 195 So. 915:

"A comprehensive plan is set out to prevent any one from foisting on the unwary investor securities which are unsound, or, to use the language employed by the legislature, to restrict the sale of securities to those which 'would not work or tend to work a fraud upon the purchaser.' Registration with the commission is accomplished by notification or qualification upon satisfactory evidence of the financial stability of the 'issuer'."

When the foregoing provisions of the Uniform Sale of Securities Law are considered together and in the light of the above cited cases, there emerges the logical and reasonable construction of Section 517.08(1) and the one evidently intended by the legislature, namely: that the commission can require registration statements to show average annual net earnings during such period of years as the commission, in the exercise of its judgment, deems advisable to enable the commission to discharge its responsibilities in effectuating the purposes of the law; provided, however, that such period can in no case be for less than two years or for more than ten years, and that in every instance the period of years must be "next prior to the close of" the fiscal year designated in such section.

May 7, 1946.—046-193.

REGISTRATION—NOTIFICATION—PERIOD OF TIME

QUESTION: Under Section 517.08(1), Florida Statutes, 1941, as amended, do the words "in continuous operation not less than three years" apply to the corporation, partnership, association, company, syndicate, or trust, or to the property, business or industry, referred to in such section?

To Honorable J. M. Lee, Chairman, Florida Securities Commission:

The aforesaid section provides that among the securities entitled to registration by notification are those

"... issued by a corporation, partnership, association, company, syndicate or trust owning a **property, business or industry which has been in continuous operation not less than three years** and which has shown during a period of not less than two years or more than ten years next prior to the close of its last fiscal year preceding the offering of such securities, average annual net earnings . . ." (Emphasis supplied)

as specified in such section.

A consideration of the phraseology employed in Section 517.08(1), as set out above, leads me to the conclusion, and it is my opinion, that the words quoted in your question apply to "a property, business or industry."

March 14, 1946.—046-99.

WITHDRAWAL—ESCROW AGREEMENT

QUESTION: Is the Florida Securities Commission authorized to permit the owner of 25,000 shares of common stock deposited with the Commission under Section 517.18, Florida Statutes, 1941, to withdraw such securities before dividends have been paid to all other stockholders as required by such section?

To Honorable J. Edwin Larson, State Treasurer-Secretary:

It is my understanding from your letter and from other information obtained in your office that the owner of the securities held as aforesaid executed an escrow agreement on the Commission's Form 17 at the time such securities were deposited; that the owner now desires to withdraw such securities with the understanding that he is to sell and transfer them to another person who will then deliver to the commission under an escrow agreement on Form 17 and pursuant to Section 517.18 a certificate or certificates for the same amount of securities withdrawn, namely: 25,000 shares of common stock.

The aforesaid Section 517.18 provides, among other things, that securities such as those to which you refer:

"* * * shall be delivered in escrow to the commission or other depository satisfactory to the commission under an escrow agreement that the owners of such securities shall not be entitled to withdraw such securities from escrow until all other stockholders who have paid for their stock in cash shall have been paid a dividend or dividends aggregating not less than six per cent shown to the satisfaction of said commission to have been actually earned on the investment in any common stock so held; * * *"
(Emphasis supplied)

The above mentioned escrow agreement, Form 17, contains the following provision:

"It is further understood and agreed by the undersigned that said securities deposited with the Securities Commission in escrow shall remain in escrow until a cash dividend or dividends aggregating not less than six per cent (6%) in cash shall have been earned and paid as shown to the satisfaction of the securities commission."

In my judgment to permit the withdrawal of the deposited securities in the circumstances delineated in your question and the first paragraph thereafter not only would render the execution of the escrow agreement required by Section 517.18 a useless and empty gesture but also would be contrary to the provisions of such section; therefore, in such circumstances it is my opinion that the commission does not have the authority to permit the withdrawal of such securities.

November 15, 1945.—045-358.

FRACTIONAL CERTIFICATES OF INTEREST—REGISTRATION

QUESTION: In view of the definition of the term "Security" in Section 517.02 (1), Florida Statutes, 1941, and the decision of the Supreme Court of Florida in *Boyer v. Black*, is it necessary for fractional certificates of interest in oil and gas titles on land situated in the State of

Florida to be registered with the Florida Securities Commission before they can be legally sold?

To Honorable J. Edwin Larson, Secretary, Securities Commission:

Section 517.02 (1) was amended by Section 1 of Chapter 21709, Laws of Florida, Acts of 1943, so that the definition of the term "Security" embraces any

"certificate of interest in an oil, gas . . . title . . . or the right to participate therein, in or on lands situated outside this state . . ."
(Emphasis supplied).

In an opinion dated August 16, 1944, I answered a request from you as to whether *Boyer v. Black*, 18 So. (2d) 886, involved the validity of that segment of the aforesaid Section 1 of Chapter 217.09 just quoted, and in so doing stated in part as follows:

" . . . that portion of the section about which you inquire was not referred to in the decision. In *South Florida Trust Co. v. Miami Coliseum Corporation* 133 So. 334, the Supreme Court said that it will not pass upon the constitutionality of a portion of a statute not before it. Consequently, it is my opinion that the decision in *Boyer v. Black* . . . did not involve the validity of that part of said section specified in your question."

So long as the law of Florida defining a "Security" includes the words first quoted above, and such words are given their plain and patently intended meaning, the conclusion seems to be inescapable that it is not necessary to register with the commission fractional certificates of interest in oil and gas titles on lands situated in Florida before such certificates can be sold legally in Florida. Therefore, I am of the opinion that your question must be answered in the negative.

August 22, 1945.—045-256.

REGISTRATION OF PROMISSORY NOTES AS SECURITIES

QUESTION: Are nine per cent discount promissory notes payable five years from date of issue and bearing no interest until maturity and interest at the rate of eight per cent per annum subsequent to maturity, and ten per cent promissory notes payable on or before ten years from date of issue and bearing interest at the rate of ten per cent per annum, to be issued in the total amount and value of \$65,000.00 by a partnership located in Florida, entitled to registration by notification with the Florida Securities Commission?

To Honorable J. Edwin Larson, Chairman, Florida Securities Commission:

Under Chapter 517, Florida Statutes, 1941, and particularly Sections 517.02 and 517.08 thereof, as amended by Chapters 21709 and 22000, Laws of Florida, 1943, the notes in question are entitled to registration by notification with the commission if the partnership has been in continuous operation not less than three years and has shown during a period of not less than two years or more than ten years next prior to the close of its last fiscal year preceding the offering of such notes, average annual net earnings of not less than one and one half times the annual interest charge on such notes and upon all other outstanding interest-bearing obligations of equal rank, after deducting all prior charges not including the charges upon any securities to be retired out of the proceeds of the sale of such notes. In the event the partnership is unable to meet any of the aforesaid requirements, such notes are not entitled to be registered with the commission by notification.

February 18, 1946.—046-59.

NET EARNINGS—PERIOD OF REPORT

QUESTION: If a corporation having a fiscal year closing December 31, issues securities otherwise entitled to registration by notification under Section 517.08(1), Florida Statutes, 1941, and makes an offering of such securities on January 10, 1946, and on the same date files with the Florida Securities Commission a registration statement to so register the securities, does the statutory period for which average annual net earnings must be shown end December 31, 1944, or December 31, 1945?

To Honorable J. Edwin Larson, State Treasurer-Secretary, Florida Securities Commission:

By Section 517.08(1), above, the securities mentioned in your question are entitled to registration by notification provided the corporation, among other things, "has shown during a period of not less than two years or more than ten years **next prior to the close of its last fiscal year preceding the offering of such securities**, average annual net earnings," in an amount to be determined in accordance with the appropriate formula of such section, and the answer to your inquiry turns on the meaning of the words in quotations that I have emphasized.

After examining pertinent court decisions and consulting the dictionary it appears that such emphasized words can be construed as meaning: "first in nearness previous to the **end** of its last fiscal year going before the offering of such securities." The application of this construction to the facts contained in the question warrants the conclusion, and it is my opinion, that the last fiscal year going before the offering terminated December 31, 1945, and that the statutory period for which average annual net earnings must be shown would also end December 31, 1945.

April 15, 1946.—046-155.

COMPENSATION—ALLOWANCE FOR EXPENSES

QUESTION: Under subsection 5 of Section 517.09, Florida Statutes, 1941, does the Florida Securities Commission have authority to fix the maximum amount to be paid so as to cover both "commission and expenses"?

To the Florida Securities Commission:

Section 517.09 (5) provides that

"With respect to securities required to be registered by qualification under the provisions of this section, the Commission may by order duly recorded fix the **maximum amount of commission or other form of remuneration** to be paid in cash or otherwise, not to exceed 20%, directly or indirectly, for or in connection with the sale or offering for sale of such securities in this state." (Emphasis supplied)

The commission is empowered under the above designated subsection, within the limitation specified, to fix the maximum percentage to be paid as "commission or other form of remuneration" for or in connection with the sale or offering for sale of securities in Florida when such securities are required to be registered by qualification. The commission appears to have been authorized to define within such limitation, the total amount of compensation to be paid for such purpose. This being the case, it seems that such total would include expenses incurred for or in connection with the sale or offering for sale of such securities in Florida. It follows, then, that such expenses should be considered as a part of the compensation allowed rather than in addition to such compensation.

I am of the opinion, therefore, that the commission is authorized to embrace expenses in its orders made under the aforesaid subsection but it

is my recommendation that instead of fixing the allowance of "commission and expenses," the better practice would be to fix the percentage permitted as the maximum amount of "commission, including expenses."

November 8, 1946.—046-467.

PUBLIC SERVICE UTILITY—EXEMPT SECURITIES

QUESTION: Are the securities of a public service utility corporation operating as such exempt under the provisions of Section 517.05(4), Florida Statutes, 1941, as amended, by reason of the statements made on page 12 of the aforesaid registration statement?

To Honorable C. M. Gay, State Comptroller:

The statements made on page 12 of said registration statement are to the effect that the issuance of the securities of such corporation is subject to regulation or supervision under the Public Utility Holding Company Act of 1935, (Title 15, Chapter 2C, USCA); and, assuming that such statements are true, it is my opinion that said securities are exempt under Section 517.05(4), Florida Statutes, 1941, as amended. See my opinion dated September 22, 1941, addressed to your commission.

December 9, 1946.—046-515.

EXEMPTED TRANSACTION—DEALER

QUESTIONS: 1. Where A, acting as "principal," accepted an order from B and otherwise participated with B in a transaction involving a sale of securities in the circumstances hereinafter described, is A entitled to claim that such transaction is exempt under Section 517.06(3), Florida Statutes, 1941, as amended?

2. Would the answer to Question No. 1 be different, and if so in what way, if A had acted as "Agent" for B in such transaction?

3. Would the answer to Question No. 1 be different, and if so in what way, (a) by reason of said order having been solicited by A or (b) by reason of said order being unsolicited by A?

To Honorable C. M. Gay, Chairman, Florida Securities Commission:

You advise that A accepted an order from B for 400 shares of stock in corporation X; that A had none of the shares of stock at the time said order was accepted and thereafter purchased said stock from four different sources to its own account as "principal"; that subsequently A delivered said stock to B; that B paid A no commission but a flat price for said stock, and that said stock has not been registered with the Florida Securities Commission. Although it is not so stated in your letter, it is indicated thereby, and we assume for the purpose of this opinion that A is an authorized securities "dealer" in Florida, as defined by Section 517.02 (4), Florida Statutes, 1941, as amended, and as such is engaged all of its time in the business of selling securities issued by another or purchasing or otherwise acquiring securities from another for the purpose of reselling them or offering them for sale to the public and in offering, buying, selling, or otherwise dealing or trading in securities as agent or principal for a commission or at a profit.

QUESTION NO. 1—Section 517.06(3), above, being a part of the section defining exempt transactions, provides:

"The isolated sale of securities when made by or on behalf of a vendor not the issuer or underwriter thereof who, being a bona fide owner of such securities, disposes of his own property for his own account, and such sale is not made, directly or indirectly, for the benefit of the issuer or an underwriter of such

security, or for the direct or indirect promotion of any scheme or enterprise with the intent of violating or evading any provision of this chapter."

I find it difficult to comprehend how A, who is engaged all of the time in the business of purchasing, buying, offering for sale, selling and otherwise dealing and trading in securities as aforesaid, could claim that the transaction described above was an "isolated sale of securities", and it seems to me that it is unnecessary to go any further in construing the section just quoted to conclude the legislature never intended that said transaction should be exempt under said section; consequently, this question is answered in the negative.

QUESTIONS NO. 2 and 3—What has been said in the last preceding paragraph is equally applicable to Questions No. 2 and 3, and, therefore, the answer to such questions is likewise in the negative.

December 12, 1946.—046-517.

DECLARATION OF TRUST—DEFINITION

QUESTION: Is the declaration of trust of the Lawyers' Title Guaranty Fund a "security" within the meaning of Section 517.02(1), Florida Statutes, 1941, as amended?

To Honorable C. M. Gay, Chairman, Florida Securities Commission:

A consideration of the purpose of said fund and the manner in which it is to function and the objective to be achieved, as reflected by said declaration of trust, can only lead one to the conclusion that said instrument is not a "security" as such word is defined in the aforesaid section, and consequently I must answer your question in the negative.

MARKS AND BRANDS OF LIVESTOCK

April 11, 1946.—046-145.

INSPECTORS—APPOINTMENT

QUESTION: What is the duty and authority of the governor so far as livestock is concerned, other than cattle, under Chapter 22856, Acts of 1945; is it his duty to appoint upon recommendation of a board of county commissioners an inspector of marks and brands for hogs and other livestock excluding cattle?

To Honorable Millard F. Caldwell, Governor:

Chapter 534, Florida Statutes, 1941, prior to the enactment of Chapter 22856, Acts of 1945, comprised the general statutory law relating to the marks and brands of livestock. The types of livestock to which various sections of Chapter 534 were applicable were bovine cattle, hogs, sheep and goats.

Chapter 22856 places the inspection and protection of bovine cattle in the state under the jurisdiction of the commissioner of agriculture, but the chapter excepts from its operation the counties of Baker, Columbia, Escambia, Gadsden, Hamilton, Holmes, Jackson, Jefferson, Leon, Levy, Madison, Okaloosa, Santa Rosa, Suwannee, and Walton. Section 21 purports to repeal Chapter 534 in its entirety, however, an opinion of the Attorney General to the Commissioner of Agriculture, dated January 7, 1946, held that the 1945 Act only repealed the provisions of Chapter 534 that relate to cattle in the counties not excluded from its operation and that the latter chapter remains in full force and effect as to hogs, sheep and goats.

It is my belief, therefore, that the powers and duties of the governor to appoint inspectors of marks and brands for hogs, sheep and goats are unaffected by the provisions of Chapter 22856, Acts of 1945.

January 7, 1946.—046-7.

OTHER LIVESTOCK

QUESTION: Does Chapter 22856, Acts of 1945, relating to recording and inspection of marks and brands only of cattle, repeal the elements of Chapter 534, Florida Statutes, 1941, in so far as they apply to other livestock?

To Honorable Nathan Mayo, Commissioner of Agriculture:

The confusion arises because Chapter 22856, apparently dealing only with cattle, by Section 21 thereof, appears to repeal all of Chapter 534, Florida Statutes, 1941, which latter chapter relates to other livestock in addition to cattle.

From an examination of the decisions of the supreme court bearing upon Chapter 534 and from a close scrutiny and analysis of the applicable sections of Chapter 22856, it is my belief that the 1945 Act only repealed the provisions of Chapter 534 that relates to cattle and this only in the area described in Section 19A of Chapter 22856. The legislature by successive acts, decided to and did, as a matter of public policy, treat of livestock other than cattle and, applying the rule of statutory construction that a statute should be so construed and applied as to give effect to the evident legislative intent, even if the result seems contradictory to rules of construction and the strict letter of the statute, it is my conclusion that the 1945 Act leaves intact the provisions of Chapter 534 relating to other livestock.

The study of the various acts relative to the preparation of this opinion, together with the decisions of our courts, leads me to suggest that this subject is in need of legislative clarification and, further, that the court should be asked to interpret the 1945 enactment and pass upon its constitutionality.

DOG AND HORSE RACING

June 10, 1946.—046-249.

RACING FUNDS—CONSTRUCTION OF HOSPITAL

QUESTION: May any part of the racing funds apportioned to Madison county board of public instruction under Chapter 21835, Laws of 1943, be diverted to payment of part of the cost of erecting a hospital?

To Honorable Colin English, State Superintendent of Public Instruction:

Chapter 21835 provides that one-half of all racing funds distributable to Madison county under the provisions of Chapter 14832, Laws of 1931, and Section 550.13, Statutes of 1941, shall be apportioned and paid to the Madison county board of public instruction to be used for school purposes. Such funds may be used only for school purposes and may not be diverted for other use.

December 4, 1945.—045-362.

MEMBERS OF THE RACING COMMISSION—EXPENSE ACCOUNTS

QUESTION: Should the allowance to members of the State Racing Commission, for per diem and mileage when traveling on state business, be governed and allowed under Section 550.03, Florida Statutes, 1941, or under Chapter 22830, Laws of Florida, Acts of 1945?

To Honorable J. M. Lee, State Comptroller:

Section 550.03, Florida Statutes, 1941, provides that "the compensation of each member of the racing commission shall be . . . , together

with necessary expenses including traveling expenses as may be approved by the commission, and the provision of Section 112.06 shall be inapplicable." Chapter 22830, Laws of Florida, Acts of 1945, provides that "state officers and employees when traveling on state business hereafter shall be allowed for subsistence seven dollars and fifty cents per diem (and) seven and one-half cents per mile." The language of Section 112.06, as amended, and of Chapter 22830, are identical except for the amounts allowed for per diem and mileage.

We held in our opinions of July 21, October 3, and November 1, 1945 (945-195, 196, 310 and 344) that Chapter 22830, Laws of Florida, Acts of 1945, superseded expense provisions in the Barbers' Sanitary Commission, the Beauty Culture law, and similar laws. These opinions were correct but do not govern the instant case. Under these laws the officers and employees travel over the entire state and are not required to spend any extended time in winter resorts as are the members of the State Racing Commission. In the instant case the law has application to the members of the racing commission only and not to the employees, while in the Barber and Beauty Culture Laws the provisions applied to both the officers and employees.

In order for us to determine the above question, it is necessary for us to construe said Section 550.03, Florida Statutes, 1941, with said Chapter 22830, Laws of Florida, Acts of 1945, which laws deal with the same general subject matter. Section 550.03 deals with the general subject matter in a more minute and definite way than does Chapter 22830, Laws of Florida, Acts of 1945, which deals with it in general and comprehensive terms. Although the 1945 act was independent and original in form, it bears such relation to Section 112.06, Florida Statutes, 1941, as would justify its being held an amendment of said section of the statute, under many authorities. (Authorities cited in note 2, volume 1, page 325, *Southerland Statutory Construction*, 3rd. Ed.; 59 C. J. 850, section 421). If it should be held to be an amendment or extension of Section 112.06 and not an original enactment, then the exemption in Section 550.03, Florida Statutes, 1941, would apply and Chapter 22830 would not be applicable to expenses of the members of the State Racing Commission.

It is general public knowledge, and a fact with which the legislature is well acquainted, that the members of the State Racing Commission are required to spend considerable time attending and supervising race meets in the winter resorts of Florida and that such race meets are usually held during the winter seasons when living expenses, at such winter resorts, are excessive and far above those in normal times and places. It is common knowledge that room and board cannot be obtained in such places for anything near the amount allowed under Chapter 22830. In construing statutes, courts should look to conditions of the country to be affected by the enactment, as well as the purposes thereof. (*Ideal Farms Drainage District v. Certain Lands*, 154 Fla. 554, 19 So. 2d. 234; *Peninsula Land Company v. Howard*, 149 Fla. 772, 786, 6 So. 2d. 384). After the attorney general held an act of 1933 to be applicable to the racing commission, the 1935 legislature exempted it from the operation of the 1933 law, evidently because of reasons and conditions similar to those above mentioned and enumerated. These matters show reasons why the legislature may not have intended to repeal the provisions in Section 550.03, exempting the State Racing Commission from the general laws relating to travel expenses and their allowance.

It will also "be presumed that the legislature, in enacting a statute, acted with full knowledge of existing statutes relating to the same subject; and where express terms of repeal are not used, the presumption is always against an intention to repeal an earlier statute, unless there is such inconsistency or repugnancy between the statutes as will preclude the presumption, or the latter statute revises the whole subject matter of the former." (*American Bakeries Company v. Haines City*, 131 Fla. 790, 180 So. 524, text 532). Our supreme court is "committed to the rule that

if the court can, by any fair, strict or liberal construction, find for conflicting provisions (of two or more statutes) a reasonable field of operation which may preserve the force and effect of each statute and cause the same to harmonize, it is their duty to do so." (*Ideal Farms Drainage District v. Certain Lands*, supra). When the reasons above stated are applied to the two statutes in question, it seems that they may be construed to have separate fields of operation and may be harmonized in their fields of operation.

In conclusion, when the two laws are considered in the light of the above mentioned authorities and conditions and reasons are considered for applying a different rule to the members of the State Racing Commission, (because of the conditions under which they are required to perform their duties), I am of the opinion that the legislature never intended to repeal the exception (in Section 550.03) of the members of the State Racing Commission from the general laws relating to travel expenses. This being true, the allowance to members of the State Racing Commission, for per diem and mileage when traveling on state business, is governed by and should be allowed under Section 550.03, Florida Statutes, 1941, instead of Chapter 22830, Laws of Florida, Acts of 1945.

CHAPTER XXVIII

LIQUORS AND BEVERAGES

BEVERAGE LAW; ADMINISTRATION

February 20, 1946.—046-68.

LICENSE—ISSUING OFFICER

QUESTION: Where all of the requirements of the Beverage Law have been met to entitle an applicant to a license under Section 561.34, Florida Statutes, 1941, may such license be issued solely upon the signature of the tax collector or should the license be signed by both the tax collector and the county judge?

To Honorable P. E. Henderson, Assistant Director, State Beverage Department:

From an examination of Chapter 561 of the aforesaid statutes, relating to the administration of the Beverage Law, it appears that the applicant for a license such as that to which you refer must pay not only a state license tax but also a county license tax in an amount equal to said state tax and that the license is issued by the tax collector of the county in which the place of business of the applicant is located.

Section 17 of Article V of the Constitution of the State of Florida defines the jurisdiction of a county judge to include that "He shall . . . issue all licenses required by law to be issued in the county," and, by Section 205.01, Florida Statutes, 1941, (Section 1 of Chapter 20956, Laws of Florida, 1941) regarding license taxes, it is provided that: ". . . in case the license is issued by the tax collector, he must collect in addition thereto the county judge's fee of twenty-five cents for each county license signed by him, and such license shall be signed by the tax collector and the county judge and shall have the county judge's seal thereon."

Based upon the foregoing, it is my opinion that the license about which you inquire should not be issued upon the signature of the tax collector alone, but should be signed by both the tax collector and the county judge.

August 31, 1945.—045-274.

MUNICIPALITIES—POWER TO PROHIBIT SALE OF WINE IN WET COUNTIES

QUESTION: Can a municipality, by ordinance, legally prohibit within its limits the sale of wine containing more than fourteen per cent of alcohol by weight, if such municipality is situated in a county which has voted in a local option election not to prohibit therein the sale of intoxicating liquors, wines or beer?

To Honorable James T. Vocelle, Director, State Beverage Department:

It is provided by Section 1, Article XIX of the Constitution of the State of Florida that

"The board of county commissioners of each county in the state, not oftener than once in every two years, upon the application of one-fourth of the registered voters of any county, shall call and provide for an election in the county in which application is made, to decide whether the sale of intoxicating liquors, wines or beer shall be prohibited therein, the question to be de-

terminated by a majority of those voting at the election called under this section" (Emphasis supplied)

By Section 561.01(8), Florida Statutes Annotated, the term "intoxicating liquor" is defined to include those wines containing more than three and two-tenths per cent of alcohol by weight. .

From your letter and question it appears that even though a majority of those voting at an election called under the aforesaid article have determined that the sale of intoxicating liquors, wines or beer shall not be prohibited in the county in which such election was held, some municipality in such county has enacted an ordinance proscribing within the boundaries of such municipality the sale of wine containing more than fourteen per cent of alcohol by weight, which wine would be intoxicating wine under the above definition.

It is obvious that the county is made the unit for an election under the aforesaid article and that where the result of the election is against the sale of intoxicating liquors, wines or beer, such sale is prohibited throughout the entire territory. (McGriff vs. State, 63 So. 724) If the result of such an election is not to prohibit the sale of intoxicating liquors, wines or beer, it would seem that the sale of such liquors, wines or beer is permitted throughout the whole county. Our supreme court said in *ex parte Lewinsky*, 63 So. 577, that

"In counties where the sale of intoxicating liquors is permitted under article 19 of the constitution, the legislature is still free to regulate the sale so long as it stops short of actual or practical prohibition." (Emphasis supplied)

Based upon the foregoing, the legislature could not proscribe the sale of wine having more than fourteen per cent of alcohol by weight in the municipality referred to and could not authorize such municipality to enact an ordinance inhibiting the sale of such wine. It follows as a patent corollary that such municipality could not legally interdict the sale of such wine by ordinance. Consequently, your question is answered in the negative.

January 29, 1946.—046-31.

CITY LICENSE—EMPLOYEES AND TRUCKS OF NONRESIDENT DISTRIBUTOR

QUESTIONS: 1. If a wholesale distributor of beer and wine has paid all taxes legally imposed by the municipality in which its place of business is established permanently, as well as all lawful state and county taxes, and its salesmen are taking orders for beer and wine from properly licensed retail vendors in other Florida cities for subsequent delivery and the beer and wine so ordered is delivered to such vendors in trucks owned by the distributor and driven by its drivers, can the cities in which such vendors have their places of business levy a valid license tax on such salesmen, drivers or trucks?

2. If the truck drivers of the aforesaid distributor are also making sales and deliveries of beer and wine to the above mentioned vendors directly from the trucks of the distributor, can the cities in which such vendors have their places of business levy a valid license tax on such drivers or trucks?

To Honorable Jame T. Vocelle, Director, Florida State Beverage Department:

Section 561.36 of Florida Statutes, 1941, before its inclusion in such statutes, was Section 12 of Chapter 18015, General Laws of Florida, 1937, which became effective on January 5, 1937, and provides that "Each incorporated city or town in the state may levy and collect a license tax

on each * * *, distributor, vendor,* * * having a place of business * * * within the corporate limits of such city or town not to exceed fifty per cent of the state and county license tax herein provided, * * *" and that "No tax on the * * *, distribution, transportation, importation or sale of such beverages shall be imposed by way of license, excise or otherwise, by any municipality, any tning in any municipal charter, special or general law to the contrary notwithstanding, except as herein expressly authorized."

In the circumstances set forth in your questions the foregoing section of the State Beverage Law contains no authority for a city to levy license taxes such as those about which you inquire and a search of the other general laws of Florida, including the remaining sections of such beverage law, fails to reveal any such authority. Because of the absence of such authority and on the strength of the decision of our supreme court in *Langston v. Lundsford*, 165 So. 898, I am of the opinion that both of your questions should be answered in the negative. This conclusion, however, does not apply to any municipality to which the legislature may have undertaken to grant such authority by special act since June 5, 1937, as it is impossible to render an opinion as to such a municipality without examining and considering the special act.

January 10, 1945.—045-7.

WINE AND BEER—LEGAL HOURS FOR SALE

QUESTION: What are the hours during which the sale of wines and beers is prohibited by the laws of Florida?

To Honorable W. H. Wells, Sheriff of Flagler County, Bunnell, Florida:

The law governing your question is found in Chapter 21944, Laws of Florida, Acts of 1943 (Section 562.14, Florida Statutes, Annotated), relating to the sale of alcoholic beverages and intoxicating beverages and Chapter 21839, Laws of Florida, Acts of 1943 (Section 561.01, Florida Statutes, Annotated), defining the term "alcoholic beverages" to include all beverages containing more than one per cent of alcohol by weight and the term "intoxicating beverages" to include only those wines and beers containing more than three and two-tenths per cent of alcohol by weight.

It is unlawful under the provisions of the aforesaid chapters to sell wines or beers containing more than three and two-tenths per cent of alcohol by weight in any place holding a license under the State Beverage Department or in any public place within the territorial limits of the state between the hours of 12 o'clock midnight Saturday and 7 o'clock A. M. on Monday, except that subject to the limitation hereinafter set forth concerning the sale of wines and beers in sealed containers for consumption off the premises, an incorporated city or town may, by ordinance, permit and regulate the sale of such wines and beers within its territorial limits between the hours of 12 o'clock midnight Saturday and 1 o'clock A. M. Sunday and between the hours of 7 o'clock A. M. and 12 o'clock midnight Sunday and the sale of such wines and beers made pursuant to such an ordinance would be legal; but no incorporated city or town may by ordinance permit the sale of wines and beers containing more than one per cent of alcohol by weight between the hours of 1 o'clock A. M. and 7 o'clock A. M. on Sunday.

Subject to the foregoing, it is unlawful under the provisions of said chapters to sell any wines or beers containing more than one per cent of alcohol by weight in any place holding a license under the State Beverage Department or in any public place within the territorial limits of Florida between the hours of midnight and 7 o'clock A. M. of the following day.

It is also made unlawful by said chapters to sell in sealed containers, for consumption off the premises, any wines or beers containing more than three and two-tenths per cent of alcohol by weight, within the territorial limits of the state, between the hours of 8 o'clock P. M. and 7 o'clock A. M. on the following day, except that no such sales may be made on Sunday.

May 30, 1946.—046-235.

INTOXICATING LIQUORS—BEER—SALE TO MINORS

QUESTION: Is it unlawful under Section 562.11, Florida Statutes, 1941, or any other provisions of the Beverage Law, for a person to sell to a minor beer containing 3.2, or less, per cent of alcohol by weight?

To Honorable Marshall R. Hayes, Sheriff, Santa Rosa County, Milton Florida:

The only provision of the Beverage Law which I have been able to find placing any restraint on the sale of alcoholic beverages to minors is found in the aforesaid Section 562.11 which reads:

"It is unlawful for any licensee to sell, give, serve or permit to be served intoxicating liquors, wines or beers to persons under twenty-one years of age."

In determining the effect of the quoted section consideration must be given to the definition in Section 561.01 (8) Florida Statutes, 1941, as amended, wherein it is provided that the term "intoxicating beverage" and the term "intoxicating liquor" includes

"only those liquors, wines and beers containing more than three and two-tenths per cent of alcohol by weight."

It will be seen from the foregoing that the lone inhibition in the Beverage Law with respect to the sale of beer to persons under twenty-one years of age is to make it unlawful for any licensee to sell to such persons beer containing more than 3.2 per cent of alcohol by weight, and consequently I must answer your question in the negative.

I agree with you that the sale of beer to boys fourteen and fifteen years of age is an evil and I admire your desire to correct the same but unfortunately there is no law against the sale of beer to such boys, except beer coming within the prohibition of Section 562.11.

June 27, 1945.—045-159.

SALE NEAR PUBLIC OR PRIVATE SCHOOLS

QUESTION: Does the word "school" as used in Section 561.44, Florida Statutes, 1941, mean a public school or does it relate to either a public or a private school?

To Honorable James T. Vocelle, Director, State Beverage Department:

The pertinent part of the aforesaid section provides that:

"No license under subsections (3), (4), (5), (6), (7) or (8) of Section 561.34 shall be granted to a vendor whose place of business is or shall be within two thousand five hundred feet of an established school or church except in incorporated cities and towns. . ."

The definitions of the term "school" reflected by reported decisions, reference works and dictionaries indicate that such term is sufficiently broad to cover both public and private schools. Moreover, it would appear that to apply the inhibition of Section 561.44 solely to public schools would narrow and restrict its obvious intent and purpose.

It is my opinion, therefore, that the word "school" as employed in the last-mentioned section is not limited in its meaning to a public school but relates to both public and private schools.

June 8, 1945.—045-141.

INTOXICATING BEVERAGES—SALE NEAR CHURCH OR SCHOOL

QUESTION: Is it lawful, under the provisions of the Beverage Law, to issue a state license to sell intoxicating beverages regardless of alcoholic content, to a retail vendor of such beverages, whose place of business is or shall be located within 2,500 feet of an established church or school, in an incorporated city or town of a county wherein the sale of intoxicating liquors, wines and beers is permitted, which city or town has enacted no ordinance restricting the location of such places of business?

To Honorable James T. Vocelle, Director, State Beverage Department:

Section 561.44, Florida Statutes, 1941, relating to the licensing of the kind of vendors referred to in your question, provides as follows:

"No license . . . shall be granted to a vendor whose place of business is or shall be within two thousand five hundred feet of an established school or church, except in incorporated cities and towns,"

Said section then provides that such cities and towns are given the power to establish zoning ordinances restricting the location wherein such vendors may be permitted to conduct such places of business and that "no license shall be granted to any such licensee to conduct a place of business in a location where such place of business is prohibited from being operated by such municipal ordinance."

The legislature has thus, by an express exception, excluded incorporated cities and towns from the effect of the above general restriction of 2,500 feet and, in lieu thereof, has authorized the enactment of local ordinances to restrict the location of such places of business. If the governing body of the city in question has enacted no such ordinance, then no restriction upon the location of such places of business exists therein under the provisions of the Beverage Law.

For the foregoing reasons, it is my opinion that your question, as stated above, should be answered in the affirmative.

June 5, 1945.—045-134.

MOONSHINE WHISKEY—MANUFACTURE IN DRY COUNTY

QUESTION: Under what statutes may a person be prosecuted who manufactures moonshine whiskey in a dry county without having a manufacturer's license?

To Honorable John H. Shuman, County Prosecuting Attorney, Monticello, Florida:

A license cannot be obtained for the manufacture of whiskey in a dry county. See Section 561.43, Florida Statutes, 1941. Therefore, any whiskey manufactured in a dry county is moonshine whiskey because it is not made under the regulatory provisions of the Beverage Act, and it stands on the same footing as moonshine whiskey made in a wet county.

If you can prove the manufacture of moonshine whiskey, you are ordinarily in position to prove the possession of the still with which it was made, or some part thereof, or of mash, wort, or other fermented liquid capable of being made into whiskey, and you can prosecute for such possession under Section 562.27, Florida Statutes, 1941, as amended by Chapter 22669, Acts of 1945.

Also, if you can prove the manufacture of moonshine whiskey, you are usually in position to prove possession of such whiskey, and you can prosecute for such possession under Section 562.15, Florida Statutes, 1941, as amended by Chapter 22669, Acts of 1945.

Sections 562.15 and 562.27, *supra*, as amended by Chapter 22669, *supra*, constitute parts of the Beverage Act and apply to dry counties, because Chapter 568, Florida Statutes, 1941, relating to dry counties, is made a part of the Beverage Act by Section 561.01 (9), 1943 Supplement to Florida Statutes, 1941, being Section 1 of Chapter 21839, Acts of 1943.

November 16, 1945.—045-360.

EMPLOYEES OF DEPARTMENT—AUTHORITY TO EXECUTE SEARCH WARRANTS

QUESTION: What authority do the employees of the State Beverage Department have under Sections 561.07 and 561.52, Florida Statutes, 1941, in the execution of search warrants?

To Honorable James T. Vocelle, Director, State Beverage Department:

In defining the powers and duties of the supervisors of the State Beverage Department the aforesaid Section 561.07, as amended by Section 3, Chapter 22663, Laws of Florida, Acts of 1945, provides that they shall have, among other things, "access to and . . . the right to inspect the premises of all licensees under the Beverage Act and under the Cigarette Tax Act now in effect or which may hereinafter be re-enacted . . . and to examine the books and records of all licensees . . . Such supervisors shall have all the power of deputy sheriffs in the enforcement of the Beverage Laws and the Cigarette Tax Laws of this state, and in the prosecution of offenders against such laws" while the pertinent part of Section 561.52, as amended by Section 10 of such chapter, reads: "All white male employees of the State Beverage Department are hereby vested with all the authority and power that is conferred on supervisors in Section 561.07 . . . Florida Statutes, 1941, with respect to the Beverage and Cigarette Tax Laws of the state."

By Section 933.07, Florida Statutes, 1941, a search warrant shall issue in appropriate cases "to any sheriff and his deputies or any constable, police officer or other person authorized by law to execute process, commanding the officer or person forthwith to search the property described in the warrant or the person named, for the property specified" (Emphasis supplied).

When the aforesaid sections are considered together it appears that supervisors of the department and all of its white male employees have "all the power of deputy sheriffs in the enforcement of the Beverage Laws and the Cigarette Tax Laws of this state" and that they have the same authority as deputy sheriffs to execute search warrants in the enforcement of those of such laws where the issuance of such a warrant is authorized.

It is common knowledge that the execution of a search warrant is a task in which many officers and others have been injured or lost their lives. Anyone called upon to execute a search warrant without first having been trained for such an undertaking by an officer experienced in the execution of such warrants is assuming a dangerous responsibility indeed. It is respectfully urged, therefore, that this responsibility be given only to those supervisors or white male employees of the department who are trained or experienced in the execution of search warrants.

In an opinion dated July 6, 1945 and addressed to you on the same subject. I expressed doubt as to whether the aforesaid supervisors or all male employees had authority to execute the warrants in question and

recommended that no such warrants be executed by them until the Supreme Court of Florida has decided that they possess such authority. However, in view of what has been set forth above, I desire to, and do, hereby withdraw and cancel said opinion dated July 9, 1945 and substitute in lieu thereof the conclusion and opinion herein.

October 15, 1946.—046-449.

CONSTABLE—SEARCH WITHOUT WARRANT

QUESTION: Is a constable empowered to make the searches authorized by Section 562.03, Florida Statutes, 1941?

To Honorable John Dickinson, Prosecuting Attorney, St. Petersburg, Florida:

Section 562.03, Florida Statutes, 1941, authorizes beverage department supervisors, sheriffs, deputy sheriffs and police officers to search the places of business of licensees under the Beverage Act, during business hours, without search warrant.

Clearly, a constable is not a supervisor, sheriff or deputy sheriff.

Is he a police officer within the meaning of the statute? A "police officer" is one of the staff employed to enforce the laws and ordinances of a city and preserve the peace and good order of the community. 43 C. J. 763, "Municipal Corporations," Section 1315; also, see 32 Words and Phrases 725-726. It is obvious that a constable does not fall within this definition.

Also, an examination of the following sections of Florida Statutes, 1941, leads to the conclusion that the legislature customarily refers to both constables and police officers when it wishes to confer powers or impose duties upon both classes of officers; that the terms "constable" and "police officer" are not used interchangeably; and that the term "police officer" is not meant to include constables, to-wit:

Section 821.32, relating to the arrest of trespassers on Sunday without warrant.

Section 828.17, authorizing arrest without warrant for specified crimes.

Section 831.20, authorizing seizure of counterfeit bills and counterfeiters' tools.

Section 843.06, relating to neglect or refusal to aid peace officers.

Section 843.08, relating to false personation of an officer.

Section 859.07, imposing duty to enforce Section 859.06.

Section 933.07, prescribing officers to whom search warrant may be issued.

In my opinion, Section 562.03 does not authorize a constable to make the searches without search warrant therein provided for.

November 15, 1945.—045-359.

SUPERVISORS OF DEPARTMENT—AUTHORITY TO EXECUTE WARRANTS

QUESTION: In view of Section 3 of Chapter 22663, Laws of Florida, Acts of 1945 (Section 561.07, Florida Statutes, 1941, as amended) and Section 901.04, Florida Statutes, 1941, do the supervisors of the State Beverage Department have authority to execute warrants for the arrest of persons charged with violations of the beverage laws of Florida (Chapters 561, 562, 568 and 569 of Florida Statutes, 1941)?

To Honorable James T. Vocelle, Director, State Beverage Department:

Section 3 of Chapter 22663, *supra*, provides, among other things, that the supervisors of the State Beverage Department

"... shall have all the power of deputy sheriff in the enforcement of the beverage laws ... of this state, and in the prosecution of offenders against such laws,"

while Section 901.04, *supra*, provides in part that

"The warrant shall be directed to all and singular the sheriffs and constables of the State of Florida. It shall be executed only by a sheriff or constable of the county in which the arrest is made, unless the arrest is made in hot pursuit, in which event it may be executed by any sheriff or constable who is advised of the existence of said warrant."

It is provided by Section 30.07, Florida Statutes, 1941, that

"Sheriffs may appoint deputies to act under them who shall have the same power as the sheriff appointing them, and for the neglect and default of whom in the execution of their office the sheriff shall be responsible."

As early as *Guarantee Trust & Safe Deposit Co. v. Buddington*, 2 So. 885, the Supreme Court of Florida held that the appointment by a sheriff of a general deputy or under-sheriff gives to the latter authority to do any official act that the former may do, except the appointment of a deputy. And the legislature of 1945, through Section 4 of Chapter 22790, amended Section 30.15, Florida Statutes, 1941, so that the pertinent parts thereof read as follows:

"Sheriffs, in their respective counties, in person or by deputy, shall:

(1) Execute all process of the supreme court, circuit courts, courts of record, civil courts of record, county courts, criminal courts ... of this state, to be executed in their counties;

(2) Execute such process of the county judges' courts and justice of the peace courts, as may come to their hands to be served in their counties; and,

(3) Execute such other writs, processes, warrants and other papers directed to them, as may come to their hands to be executed in their counties."

A cursory reading of Section 901.04 might lead to the inference that a warrant can be executed only by a sheriff or a constable, but a careful perusal of this section indicates that such was not the intention of the legislature. This indication is supported by the fact that from a practical, if not from a physical, standpoint it would be impossible for all of the warrants issued in the more populous counties of the state to be executed only by their sheriffs and constables. Moreover, an examination of this section, with the aforesaid Section 30.07 and Section 4 of Chapter 22790, as well as the case of *Guarantee Trust & Safe Deposit Co. v. Buddington*, reveals that deputy sheriffs do have authority to execute warrants. When this determination is considered in the light of the above mentioned Section 3 of Chapter 22663, the opinion seems to be justified, and it is my opinion, that the supervisors of the State Beverage Department have the same authority as deputy sheriffs to execute warrants for the purpose specified in your inquiry.

April 18, 1946.—046-163.

AD VALOREM TAXES—ALCOHOLIC BEVERAGES

QUESTION: Are the stocks of alcoholic beverages in a county, between the first day of January and the first day of March in any year,

subject to ad valorem taxes for that year where the county was voted dry after the first day of March in said year?

To Honorable J. M. Lee, State Comptroller:

Under Section 561.50, Florida Statutes, 1941, it is provided that "there shall be only one state tax paid as to each gallon or fraction thereof of beverages sold under the beverage law, and **no other excise tax** shall be levied directly or indirectly." It is to be noted that this section does not prohibit the levying of ad valorem taxes on alcoholic beverages but no other excise taxes.

Unless expressly exempted from taxation, all real and personal property in this state is subject to taxation (Section 192.01, Florida Statutes, 1941) as of the first day of January of each year (Sections 192.04 and 200.02, Florida Statutes, 1941). Section 200.13, Florida Statutes, 1941, provides that "the tax assessor shall enter upon and include in said tax roll the name of each and every person, firm and corporation who or which between January first and March first of that year was . . . doing business in said county, and shall enter upon said tax roll . . . the name of each person, firm or corporation not an inhabitant of the county or not doing business therein who or which between said dates that year had located in the county tangible personal property." Alcoholic beverages constitute personal property subject to ad valorem taxation (61 C. J. 191, note 32 (f) and 216, note 90(d)).

In the light of the above statutes and authorities, alcoholic beverages located in a county between January first and March first of any year are subject to taxation in that county, and the fact that the county was voted dry after March first and the alcoholic beverages were removed from the county does not change the above rule. Therefore, the above stated question must be answered in the affirmative.

May 30, 1946.—046-236.

APPLICATION FOR LICENSE—DISAPPROVAL

QUESTION: Does a board of county commissioners have any recourse under the Beverage Law when an application for a beverage license disapproved by such board is approved thereafter by the director of the State Beverage Department?

To Honorable John T. Ferreira, Chairman, Board of County Commissioners, Nassau County, Fernandina, Florida:

It appears that your question is controlled by Section 561.20, Florida Statutes, 1941. Such section provides that if the finding of the board of county commissioners shall have been unfavorable to the applicant for a beverage license but the director of the State Beverage Department, pursuant to the provisions of such section, shall find that the applicant possesses the qualifications, as defined by the Beverage Law, the director shall so find and endorse his finding on the application for such license and

"shall forward such application to the tax collector. **Upon approval by the director of such application**, and payment to the tax collector of the license tax hereby required, and the filing and approval of bond where such filing and approval of bond be required, **such license shall be issued to the applicant.**" (Emphasis supplied)

Under the provisions of such section it seems clear that the application is returned to the board of county commissioners by the director, and that such board is authorized to further consider the application, only in those cases where the director disapproves the application.

Based upon the foregoing, it is my opinion that in the circumstances specified in the above question a board of county commissioners does not have any recourse under the Beverage Law, and therefore, the question is answered in the negative.

October 30, 1946.—046-456.

FREE BEER—TAX DEDUCTION

QUESTION: Under Section 561.46, Florida Statutes, 1941, as amended by Chapter 22562, Laws of Florida, 1945, is a brewery situated in Florida entitled to a deduction on its report of tax liability to the state beverage department for beer given away at the brewery either to employees or to customers for which the brewery says no charge was made?

To Honorable James T. Vocelle, Director, State Beverage Department:

For the purpose of answering your inquiry, it will be assumed that the brewery is a manufacturer of malt beverages and nothing else, as defined in the Beverage Law of Florida, and it will further be assumed that the beer was not sold but was given away without charge.

When Section 561.46, as amended, is considered in the light of the provisions contained in Section 561.50 and 561.55, Florida Statutes, 1941, it is made to appear that the tax provided by said Section 561.46 is imposed on the sale rather than the manufacture of the beverage. While this specific question was not raised in the case of *State ex rel. Southern Brewing Co. v. Long*, 181 So. 421, the decision therein does contain language indicating our supreme court holds a similar view in respect of such question. It is my opinion, therefore, that your question is properly answered in the affirmative.

June 18, 1946.—046-264.

SALE OF BEER—EXCISE TAX PAYMENT

QUESTION: Can the director of the State Beverage Department authorize the sale of beer within the State of Florida without the payment of the excise tax provided by the Beverage Law?

To Honorable James T. Vocelle, Director, State Beverage Department:

A consideration of the pertinent sections of the Beverage Law reveals that the director of the State Beverage Department is not authorized to permit the sale of beer in Florida without the payment of the tax referred to in your question and, therefore, the question is answered in the negative.

October 31, 1946.—046-459.

CLUB LICENSE—CHARTER—TIME

QUESTION: Is it necessary under Section 561.34 (11), Florida Statutes, 1941, for a club to be chartered or incorporated for a period of not less than two years at the time of application for a license under said section, if the club has been in continuous active existence and operation for a period of not less than two years at the time said application is made and the club is chartered or incorporated at said time?

To Honorable James T. Vocelle, Director, State Beverage Department:

It appears from the attachment to your letter that a club which has been in continuous active existence and operation for more than two years but is not now chartered or incorporated has advanced the argument to you that, in the event it should become chartered or incorporated and makes application for a license under the aforesaid section, it would

be entitled to such license even though it had not been chartered or incorporated for not less than two years prior to making said application, because the provisions of said section do not require that a club be chartered or incorporated for such a period of time if the club has been in continuous active existence and operation for the requisite interval.

You advise that, since its inception in 1935, or a period of eleven years, the state beverage department has construed the section under discussion to mean that a club must not only have been in continuous active existence and operation for not less than two years before making application for a license but also must have been chartered or incorporated for that length of time. It is recognized that an administrative interpretation of a statute is not binding upon the courts, but it is the law that such a construction is a persuasive force and influence with the courts when not in conflict with some provision of the constitution or the plain intent of the statute. See *State ex rel. Fronton Exhibition Co. v. Stein*, 198 So. 82; *State ex rel. Franklin County v. Lee*, 188 So. 775 and *Volunteer State Life Ins. Co. v. Larson*, 2 So. (2d) 386.

While I can see where argument can be made (as has already been done in the attachment to your letter) in support of the contention stated in the first paragraph following the question herein, I do not think that such contention can be said to express the plain intent of the statute. Neither do I consider that the construction of the State Beverage Department is in conflict with the plain intent of the statute; on the contrary, it seems to me that the statute is susceptible of the interpretation given it by such department.

In view of the foregoing, it is my recommendation that you adhere to your department's construction of Section 561.34(11) unless and until the Supreme Court of Florida construes the statute otherwise.

BEVERAGE LAW; ENFORCEMENT

November 20, 1946.—046-483.

TRANSPORTATION OF MOONSHINE—ILLEGALITY

QUESTION: When a man is apprehended by the arresting officers of the law in possession of moonshine whiskey, and said man had been hauling said moonshine whiskey in an automobile for several miles before the officers were able to compel him to stop running the said automobile (all of the aforesaid occurring in a single county of Florida) can said man be properly and legally prosecuted for two offenses, to-wit: Illegal possession of moonshine whiskey, and also illegal transportation of said moonshine whiskey; in two separate cases, or can he be prosecuted for only one offense?

To Honorable J. M. Hearn, County Judge, Suwannee County, Live Oak, Florida:

Section 562.45-1, Florida Statutes, 1941, as amended by laws of 1945, makes it unlawful to possess moonshine liquor and provides a punishment therefor as prescribed in Section 562.45, Florida Statutes, 1941.

Due to the uncertainties in our laws, I am not at all convinced that it is illegal to transport moonshine liquor within the State of Florida, or if there is such an offense, your court would have jurisdiction of the crime.

Therefore, I would advise that only one offense be prosecuted, that is, illegal possession of moonshine liquor.

November 26, 1945.—045-376.

ALCOHOLIC BEVERAGES—LEGALITY OF SALE ON SUNDAY

QUESTION: Can alcoholic beverages or intoxicating beverages be sold legally on Sunday in Florida in territory outside of incorporated cities and towns?

To Honorable Edwin G. Fraser, Macclenny, Florida:

Your question is controlled by Chapter 21944, Laws of Florida, Acts of 1943 (Section 562.14, 1943 Cumulative Supplement to Volume I, Florida Statutes, 1941) as amended by Chapter 22605, Laws of Florida, Acts of 1945, concerning, among other things, the sale of alcoholic beverages and intoxicating beverages on Sunday, and Chapter 21839, Laws of Florida, Acts of 1943 (Section 561.01 of the aforesaid Cumulative Supplement) defining the term "alcoholic beverages" to include all beverages containing more than one per cent of alcohol by weight and the term "intoxicating beverages" to include only those liquors, wines and beers containing more than three and two tenths per cent of alcohol by weight.

Based upon a construction of the above mentioned statutes, it is my opinion that in the State of Florida in territory outside the boundaries of incorporated cities and towns:

(1) Beverages containing more than one per cent of alcohol by weight (includes **intoxicating beverages**) cannot be sold legally between 12 o'clock midnight Saturday and 7 o'clock a. m. Sunday in any place holding a license under the State Beverage Department of Florida or in any public place, regardless of whether the licensee is engaged in the sale of such beverages for consumption on or off the premises.

(2) Beverages containing more than three and two tenths per cent of alcohol by weight (**intoxicating beverages**) cannot be sold legally between 7 o'clock a. m. Sunday and 12 o'clock midnight Sunday in any place or by any licensee such as those described under (1), above.

(3) Beverages containing more than one per cent, but not more than three and two-tenths per cent, of alcohol by weight (**excludes intoxicating beverages**) can be sold legally between 7 o'clock a. m. Sunday and 12 o'clock midnight Sunday.

(4) Nothing in paragraphs numbered (1), (2) or (3) above, applies to beverages served on any dining, club, parlor, buffet or observation car operated on any railroad, but such beverages may be sold only to passengers on such cars and must be served for consumption thereon.

November 2, 1945.—045-351.

HOURS OF SALE—POWER OF MUNICIPALITIES TO REGULATE

QUESTION: Do incorporated cities and towns have authority to adopt ordinances or resolutions allowing the sale after eight o'clock P. M. of alcoholic beverages or intoxicating beverages to be consumed off the premises?

To Honorable Thompson H. Getzen, County Solicitor, Dade City, Florida:

According to Chapter 21839, Laws of Florida, Acts of 1943 (Section 561.01, Florida Statutes, 1941, as amended), the term "**intoxicating beverages**" includes only those liquors, wines and beers containing more than three and two-tenths per cent of alcohol by weight, while the term "**alcohol beverages**" includes all beverages containing more than one per cent of alcohol by weight.

Chapter 21944, Laws of Florida, Acts of 1943, as amended by Chapter 22605, Laws of Florida, Acts of 1945 (Section 562.14, Florida Statutes,

1941, as amended) prescribes the hours of sale of **alcoholic beverages** to be consumed both on and off the premises, and contains the proviso: "that incorporated cities and towns may, at the cessation of hostilities between the United States of America and those foreign nations with which the United States is now, or may hereafter be, engaged in war, notwithstanding the provisions of this section, by ordinance or resolution, thereafter regulate the hours of sale of **alcoholic beverages** within such incorporated cities and towns, independent of the provisions of this section." (Emphasis supplied)

The terms "cessation of hostilities" and "war" as used above are defined by the aforesaid Chapter 21944 to mean the "permanent cessation of active hostilities between the United States of America and all of the foreign nations with which the United States is now, or may hereafter be, engaged in war."

In an opinion dated August 27, 1945, addressed to the Honorable Frank Bane, Council of State Governments, Washington, D. C., regarding various of our statutes having provisions relating to the conclusion of war, I said with respect to the words "cessation of active hostilities" as employed above, that "The word 'hostility,' in the law of nations relates to a state of open war (41 C. J. S. 361; Kent. Comm. 56, 60; Black's Law Dictionary; Webster's New International Dictionary); or an actual operation in the conduct of war (Queen Insurance Company v. Globe and Rutgers Fire Insurance Company, (C. C. A. N. Y.) 282 Fed. 976, text 979). Statutes of this nature would seem to terminate just as soon as the state of open war comes to an end and are not dependent on the signing of a treaty of peace."

Chapter 568, Florida Statutes, 1941, relating to **Intoxicating Liquors in Counties Where Prohibited**, has three pertinent sections, namely: 568.01, providing that all liquors, wines or beer containing more than three and two-tenths per cent of alcohol by weight shall be deemed to be **intoxicating liquors, wines or beer** and "subject to the provisions of this chapter"; 568.02, by which it is unlawful for anyone to sell, or cause to be sold, any **intoxicating liquors, wines or beer** in any county that has voted against the sale of such beverages and 568.03, making it unlawful for anyone to keep or possess **intoxicating liquors, wines or beer** in any such county with intent to sell or dispose of them unlawfully.

It would seem then, that there has been a cessation of hostilities between the United States of America and those foreign nations with which the United States was engaged in war, and that the remainder of the answer to your question should be divided as follows:

(1) Incorporated cities and towns situated in counties which have voted to **permit** the sale of **intoxicating beverages** as defined above may now, by proper ordinance, regulate within their corporate limits the hours of sale of all **alcoholic beverages** having more than one per cent of alcohol by weight (**including intoxicating beverages**) regardless of whether such beverages are to be consumed on or off the premises;

(2) Incorporated cities and towns located in counties that have voted to **prohibit** the sale of **intoxicating beverages** as defined above may now, by proper ordinance, regulate the hours of sale within their corporate boundaries of those **alcoholic beverages** containing more than one per cent, but not more than three and two-tenths per cent, of alcohol by weight (**excludes intoxicating beverages**) irrespective of whether such beverages are to be consumed on or off the premises; and

(3) It is not unlikely that the charters of some municipalities will cause doubt as to whether they have actually the privilege of choosing between an ordinance and a resolution as the method by which the legislative power under discussion may be exercised, and, therefore, the only safe course is to accomplish the regulation by ordinance.

A copy of the Chapter 22605, *supra*, is attached for your information. With respect to your remaining inquiries, it is felt that you can readily secure the information desired by reference to the appropriate sections of Volume II, Annotations, and the 1943 Cumulative Supplement thereto, of Florida Statutes, 1941, as amended.

LOCAL OPTION ELECTIONS

November 25, 1946.—046-481.

TIME FOR HOLDING—FOLLOWING OTHER ELECTIONS

QUESTION: If an application for local option election is presented at such a time that under the provisions of Section 567.04, Florida Statutes, 1941, said local option election would take place within 60 days of a state or national election, does said section mean that such local option election shall be held within 60 days after the state or national election, or after a period of 60 days has elapsed following the state or national election?

To Honorable Dave Thomas, Jacksonville, Florida:

Section 567.04 provides:

"All elections ordered under this chapter shall be held within sixty days from the time of presenting such application, but if any such election should thereby take place within sixty days of any state or national election, it shall be held within sixty days after any such state or national election."

Applying to such section the plain meaning of the language employed therein, it seems clear that, in the circumstances set forth in your question, the local option election shall be held **within 60 days after** the state or national election, and such is my opinion.

February 22, 1946.—046-65.

BALLOT—STATEMENT OF OBJECT

QUESTION: Does a ballot meet the requirements of law for use in a local option election if the same is printed on plain white paper as follows:

"OFFICIAL BALLOT NO.....

.....
OFFICIAL BALLOT NO.....

.....
OFFICIAL ELECTION BALLOT

MARCH 5, 1946

WAKULLA COUNTY, FLORIDA

PRECINCT NO. 4

Special Election to determine whether it shall be lawful or unlawful to sell or offer for sale intoxicating beverages in the County of Wakulla, State of Florida.

Make an (X) in the square at the right of your choice.

FOR SELLING	
AGAINST SELLING	

"?

To Honorable G. J. Langston, Clerk of the Circuit Court, Crawfordville, Florida:

Under Section 1 of Article XIX of the constitution of the State of Florida and Section 567.01, Florida Statutes, 1941, a local option election

is held in a county "to decide whether the sale of intoxicating liquors, wines or beer shall be prohibited therein" and by virtue of Section 567.06 of said statutes it is provided that in such an election "the ballot used shall be a plain white piece of paper, having written or printed on one side thereof either 'For Selling' or 'Against Selling';"

The ballot set out above states that the election is "to determine whether it shall be lawful or unlawful to sell or offer for sale intoxicating beverages" in Wakulla county. It seems to me that the words last quoted may result in uncertainty as to the intention and will of those voting and cast doubt on the result of the election; for instance, if an elector should place an "X" in the square of his ballot to the right of "For Selling," the question might arise as to whether he is voting for making the selling of intoxicating beverages lawful or voting for making the selling of such beverages unlawful.

In view of what has been said in the two next preceding paragraphs, it is my recommendation that new ballots be printed on which the purpose of the election shall be defined as follows:

"Local Option Election to decide whether the sale of intoxicating liquors, wines or beer shall be prohibited in the County of Wakulla, State of Florida."

Predicated upon the provisions of Article XIX, above, relating to local option, the applicable sections of our statutes concerning local option elections and the holding of elections and *H. W. Metcalf Co. v. Orange County*, 47 So. 363, it is my opinion that, except for the manner in which the object of the election is stated as hereinbefore shown, the aforesaid ballot meets the requirements of law.

INTOXICATING LIQUORS IN COUNTIES WHERE PROHIBITED

May 15, 1945.—045-111.

LICENSE—ISSUANCE TO A CLUB SITUATED IN A DRY COUNTY

QUESTION: In view of Sections 568.02 and 568.03, Florida Statutes, 1941, is the director of the State Beverage Department authorized under Section 561.34 (11) of such statutes to approve the issuance of a license to a club situated in a dry county to serve and distribute intoxicating liquors, wines and beer to members and nonresident guests of such club?

To Honorable James T. Vocelle, Director, State Beverage Department:

Section 568.02 makes it unlawful for anyone to sell or cause to be sold any intoxicating liquors, wines or beer in a county that has voted against the sale of such beverages, while Section 568.03 makes it unlawful for anyone to keep or possess such beverages in such county with intent to sell or dispose of them unlawfully. Section 561.34 (11) provides for the payment of a specified license tax for certain clubs and that

"... The payment of such club license tax shall authorize the service and distribution to members and nonresident guest of the club only and such service and distribution to said members and nonresident guests shall not be deemed sales within the meaning of the law in this state but any service or distribution to anyone other than a member or nonresident guest of such licensed club shall be deemed a sale and any officer, member or employee of any such licensed club who shall sell or distribute or serve any such beverages to any person other than a member of nonresident guest of such club for money or other value shall be deemed guilty of selling such beverages without a license and shall be punished as provided by law" (Emphasis supplied)

In addition to the foregoing I have given consideration to Article XIX of the Constitution of the State of Florida concerning "Local Option" and Section 561.08 regarding the responsibility of the Director of the State Beverage Department to enforce the provisions of the Beverage Law, which law includes Sections 568.02 and 568.03.

The last two sections mentioned, in so far as we are concerned here, prohibited the sale of intoxicating liquors, wines and beer while Section 561.34 (11) provides that the **service and distribution** to members and non-resident guests of a club shall not be deemed sales. When these sections and the article of the constitution mentioned above are studied in the light of your question, it would appear that the emphasized portion of the provisions quoted from Section 561.34 (11) must be limited in its application to the bare service and distribution of such beverages; that such portion cannot be construed as providing that where the service and distribution of such beverages is made as a part of a transaction resulting in an actual sale, that there has been no sale under the law of this state.

Based upon what has been set out above, it is my opinion that the director of the State Beverage Department is not authorized to approve the issuance of a license to a club to serve and distribute intoxicating liquors, wines and beer to anyone in such circumstances as to constitute a sale, where such club is situated in a county that has voted to prohibit the sale of such beverages; but that such director is authorized to approve the issuance of a license for a club so situated to serve and distribute such beverages to its members and nonresident guests, provided that such service and distribution is made under conditions which do not constitute a sale.

CHAPTER XXIX

AGRICULTURE, HORTICULTURE AND ANIMAL INDUSTRY

STATE PLANT BOARD

June 3, 1946.—046-241.

RESEARCH—FOREIGN COUNTRIES

QUESTION: May the State Plant Board use state appropriated funds for research work in a foreign country by officers or employees of the State Plant Board for the purpose of obtaining information on manner and means of controlling a disease very dangerous to citrus?

To the State Plant Board, Florida State College for Women:

It appears that a disease of citrus trees known as Tristeza has been killing orange groves in several South American countries during the past three years. The disease has now spread over Argentina, Uruguay and Brazil. Very little, if anything, is known about the disease, its source or the manner of infection. There is danger of the disease being imported into Florida. Should the disease infect any of the groves in the state there is no known method of cure or of preventing its spread.

Section 581.02 of the Florida Statutes of 1941, sets up the very broad and extensive duties and powers of the State Plant Board. Among numerous others, that section imposes on the Board the duty to:

- (1) "Carry on investigations of methods of control, eradication and prevention of dissemination of insect pests and diseases, and for that purpose may employ the necessary experts and may rent, lease or purchase the necessary land when required for this purpose."
- (12) "Purchase all necessary materials, supplies, office and field equipment and other things and make such other expenditures as may be essential and necessary in carrying out the provisions of this chapter within the limits of the amount appropriated by law."
- (13) "Appoint such assistants, inspectors and other employees as may be required, and prescribe their duties and fix their compensation, delegate to such assistants, inspectors and other employees such powers and authority as may be deemed proper within the limits of the powers and authority conferred upon the board by this chapter."
- (14) "Enter into cooperative arrangements with any person, municipality, county and other departments of this state, and boards, officers and authorities of other states and the United States for inspection with reference to insect pests and plant diseases and for the control and eradication thereof and contribute a just proportionate share of the expenses incurred under such arrangements."

It is my opinion that under the circumstances in this case the State Plant Board has ample authority to perform its research work by its officers and employees in any of the named foreign countries where the disease is prevalent, and where, as in such a case as this, it is impossible to do its work within the state.

September 18, 1945.—045-303.

QUASI-CONFIDENTIAL INFORMATION

QUESTION: Should information of a quasi-confidential nature, obtained for pest control purposes and contained in nurserymen's duplicate invoices on file in the office of the State Plant Board, be made available to the public?

To Honorable Arthur C. Brown, Plant Commissioner, State Plant Board, Gainesville, Florida:

You state that the board sought some means whereby records of all nursery stock moved into, from, or within the State of Florida, would be instantly available for reference in case of outbreaks of highly infectious bacterial diseases; that Rule 8, Section F, which was promulgated, requires nurserymen, within one week after shipment, to mail or deliver to the nursery inspector an invoice covering every movement of nursery stock and further requires that these invoices must show the date of movement, name and address of purchaser, name and address of consignee if different from purchaser, the serial number of the certificate tag used and the number and kind of plants shipped; and that now permission has been requested to examine all of the invoices for the purpose of obtaining certain records of nurserymen, and you wish to know whether this information, gathered solely for pest control purposes, should be disclosed.

You are advised that you are not bound to produce papers or to disclose information coming into your hands when, in your judgment, disclosure would be expedient on public grounds or violative of individual rights to be protected against abuse and misuse of private correspondence. The heads of the departments of a state government are not compelled to produce letters or documents if in their opinion such production would be prejudicial to the public service, and are not a part of the public record. These communications are not public records but are in my opinion privileged and confidential, in so far as the public is involved or concerned.

It would be contrary to public policy so to hamper the functions of the plant board, designed to improve the service of our state government, which largely depends upon cooperative relations between it and the nurserymen; and the board is not required to produce such invoices which are confidential and privileged. These documents are acquired by the board for the sole purpose of administering its own affairs, and are confidential, and the use of them is limited to the purpose for which they are obtained.

It is my opinion that you are under no duty or obligation to disclose the information contained in these records to anyone and should not disclose the contents thereof unless required to do so by order of the court.

STATE LIVE STOCK SANITARY BOARD

November 14, 1946.—046-473.

CATTLE DIPPING—REIMBURSEMENT

QUESTIONS: 1. Is the State Live Stock Sanitary Board authorized or required to pay one half the actual necessary and reasonable expense in connection with the collecting, driving and dipping of cattle which are within a quarantine zone but outside the known tick infested and exposed area, the owner of such cattle by resolution adopted by the State Live Stock Sanitary Board being required to dip such cattle every thirty or sixty days for inspection to determine if the cattle have become tick infested?

2. Is the State Live Stock Sanitary Board authorized or required to pay one half the actual necessary and reasonable expense in collecting,

driving and dipping cattle which are outside of the quarantine area, but by resolution of the State Live Stock Sanitary Board are required to be dipped from time to time for the purpose of determining the extent of the spread or existence of the cattle fever tick?

To the State Live Stock Sanitary Board:

Section 585.08, Florida Statutes, 1941, authorizes the board to "make, promulgate, amend, repeal and enforce rules and regulations: (a) for the carrying out of the provisions, purposes and requirements of this chapter; * * *."

"* * * said board shall also quarantine such domestic animals as it shall find, or have reason to believe, to be infected with or exposed to any such disease." Section 585.14, Florida Statutes, 1941.

"Whenever any of the diseases enumerated in Section 585.15, or any other disease now or hereafter proclaimed by the State Live Stock Sanitary Board to be of a dangerous transmissible nature, shall exist anywhere within the State of Florida, or whenever it is deemed necessary or advisable to examine or test or treat any animal, the board may, through its representatives and agents, establish and enforce quarantine of and examine and test any infected, exposed, suspected or susceptible animals, * * *." (Emphasis supplied) Section 585.16, Florida Statutes, 1941.

"all owners, custodians or persons in charge of quarantined domestic animals * * * shall comply with all rules and regulations prescribed by the board * * *." (Emphasis supplied) Section 585.23, Florida Statutes, 1941.

A cattle owner is not required to dip his cattle except in accordance with the requirements of Chapter 585, supra, and the rules and regulations of the board. Chapter 585, supra, requires it only when the cattle owner is within a quarantine zone. The laying of the quarantine, which encloses the cattle in question, is a prerequisite to the board enforcing compulsory dipping. Section 585.27, Florida Statutes, 1941, provides:

"When the owner of any cattle which are infested with fever tick, shall be required by the board to disinfect such cattle by dipping same, one half the actual, necessary and reasonable expense incurred * * * shall be paid by the said board to such owner; * * *."

It appears, therefore, that the cattle owner is to be reimbursed when he dips in accordance with the law requiring him to dip his cattle to kill the cattle fever tick and it was not contemplated that cattle owners were to be reimbursed when they dipped their cattle to determine if they were infected with ticks.

My answer to your first question is affirmative, as such dipping for inspection within a quarantine zone is part of the method or plan of eradicating the ticks therein. My answer to your second question is negative because such dipping for inspection is primarily for the purpose of determining the extent or spread of the cattle fever tick and it would appear that this determination is to be made by the board as is authorized in Section 585.35, Florida Statutes, 1941, which provides:

"For the purpose of carrying out the provisions and requirements of this chapter, and all rules and regulations made pursuant thereto, the board, and all its employees duly authorized, are empowered to enter upon any grounds or premises in this state for the purpose of inspection, quarantine or disinfection, and to carry out any of the provisions of this chapter."

I appreciate the problems and conditions presently existing that confront the board, for which there are no provisions in Chapter 585, supra.

This happens because at the beginning of the legislation for the eradication of cattle fever tick in Florida, the legislature declared as a matter of legislative findings that all cattle in Florida were either tick infested or exposed thereto. It is common knowledge that since that time the State of Florida has been declared to be tick free. Chapter 585, *supra*, is, therefore, not so framed as to meet the present day problems. It has, so to speak, become somewhat antiquated.

May 23, 1946.—046-218.

TICK ERADICATION—COST OF DIPPING

QUESTIONS: 1. (a) Is the State Live Stock Sanitary Board authorized or required to fix the necessary and reasonable cost of dipping cattle before undertaking to enforce the dipping law?

2. (b) Is the board authorized or required to fix the necessary and reasonable cost of dipping in the absence of any legislative appropriation for tick eradication?

Are there any funds that can now be made available to the State Live Stock Sanitary Board for reimbursement to the cattle owners?

3. Is the board authorized or required to pay one-half the actual necessary and reasonable cost of dipping as the dipping is accomplished, for example, on a monthly basis (the established practice being to pay the cattle owners upon completion of the dipping schedule)?

To Dr. J. V. Knapp, Secretary, State Live Stock Sanitary Board:

Answering your first question (a), in a proceeding to compel the State Live Stock Sanitary Board to appoint a member to serve on the board of arbitration to determine the cost of dipping cattle, the work to commence six months hence, our Supreme Court said:

"The particular duty involved here is properly required to be performed before the dipping is begun. This is true because that portion of the statute immediately following is to the effect that, in the event the arbitrators refuse or neglect to determine such expense, then the State Live Stock Sanitary Board may at its option proceed to collect together and drive to and from the vats the owners' cattle, as an undertaking of its own, * * * Unless the relief sought is granted, the cattle owners, who are relators, will be deprived of the benefit of determination of a fact which is not only vital to them, but absolutely a prerequisite to a complete performance of the statutory duty of the State Live Stock Sanitary Board." *State ex rel Alderman, et al v. Beville, et al*, 144 So. 331.

Therefore, my answer is that the board is not only authorized but required to fix the cost of dipping.

Answering the first question (b), your question is a moot one. You presuppose that there has been no appropriation to carry on tick eradication. In this I do not concur. Chapter 22827, Laws of Florida, 1945, being the general appropriation act, provides \$108,600.00 to cover the items of expense. Reimbursement to the cattle owners as contemplated by Chapter 585, the construction of dipping vats, etc., are certainly proper items to be charged against expense.

Chapter 16288, Laws of Florida, 1933, levied a $\frac{1}{2}$ mill tax to defray proper items to be charged against expense. Chapter 16288, Laws of Florida, 1933, levied a $\frac{1}{2}$ mill tax to defray the expense of the operation of the State Live Stock Sanitary Board. There may be unexpended monies in this fund. Chapter 22827, *supra*, Section 12, provides for a half million dollar emergency fund to cover unforeseen emergencies, and this is an annual appropriation.

Answering your second question, it is not within my province to attempt to tell you what monies can now be made available for your use. I can only advise you as to the appropriations or the source of revenue to which you may look to secure the necessary funds to carry out your duties.

Answering your third question, it is worthy to note that the supreme court in the case of *State ex rel Alderman, et al v. Beville, supra*, said that it was "vital" to the cattle owners to know in advance what the cost of the dipping would amount to. It is common knowledge that the dipping of large herds of cattle every 14 days for many months incurs a heavy expense to the owners. The cattle owner must of necessity employ many riders and helpers to accomplish this task. There is no mention made in Chapter 585, Florida Statutes, 1941, as to when the cattle owner is to be reimbursed. Compelling the owner to bear the full load of the expense until the end of the dipping schedule, which I understand is usually nine months or more, might very easily be an insurmountable financial obligation or in many instances very burdensome. Section 585.06, Florida Statutes, 1941, provides that the board may forward to the comptroller at the end of each month a requisition for such sum of money for current and incidental expenses for the ensuing month as the board may deem to be necessary, the comptroller endorsing the requisition to the state treasurer, who in turn transmits the funds to the board. We bear in mind the aim and intent of the legislature in enacting Chapter 585, Florida Statutes, 1941, was, among other things, to free the cattle of the State of Florida from cattle fever ticks and to keep them free. A liberal construction of the law making it more easy, especially for the cattle men who are most vitally concerned, to accomplish the objectives of the legislation is certainly to be indulged in and favored, if the language of the act permits of such interpretation. "Courts, in construing statute should, so far as the language will admit, give such a construction as will make it practicable, just and reasonably convenient." (Emphasis supplied) *State ex rel Bash v. County Commissioners of Jefferson County*, 20 Fla. 425.

I realize that the board must have a wide discretion in the performance of its administrative duties, but to compel the cattle owners to wait until the end of the dipping schedule appears arbitrary and certainly not convenient for the cattle owners. I feel that a monthly reimbursement would be reasonable and especially in view of the fact the Board is permitted to requisition funds on a monthly basis. I believe the courts would very likely hold, in the event the question is presented to them, that the owner is entitled to be reimbursed monthly.

July 22, 1946.—046-312.

DEER RE-STOCKING—USE OF FUNDS

QUESTIONS: 1. May the monies in the "Collier County Special Deer License" fund be used for the purpose of restocking deer in Collier county during the present fiscal year?

2. If the answer is negative to the foregoing question, then please advise what procedure is necessary to effect the release of this money for deer restocking purposes?

To Dr. J. V. Knapp, Secretary, State Livestock Sanitary Board:

Chapter 19747, Laws of Florida, Special Acts of 1939, had for its purpose the removal, by slaughter or otherwise, of all deer from Collier county because they were fever tick infested and the restocking of the county with tick free deer. The restocking was to be completed within 36 months after the completion of the tick eradication program, the cost of the restocking to be defrayed from funds of the State Live Stock Sanitary Board and monies received from the special deer hunting licenses. Section 8 of said act provides that "from July 1 to October 31, inclusive, for the years 1939, 1940 and 1941" a deer hunting license could be procured from the county judge of Collier county for the sum of \$5.50; the county

judge to retain .50c for his fee and the balance of \$5.00 to be remitted to the state treasurer to be retained in a special fund for restocking the county with deer and all monies coming into this special fund were appropriated for that purpose. Section 12 of the act provides

"The legislature declares that this act is enacted for the purpose of meeting an emergency, and the same shall expire, and the authority herein granted shall be withdrawn at the expiration of five years after the taking effect of this act." (Emphasis supplied)

The said special act became a law May 30, 1939, and, therefore, expired May 30, 1944. The provision

"The area shall be so restocked within a period of 36 months after completion of the tick eradication program." (Section 5, Chapter 19747, supra)

seemingly conflicts with the expiration date of said act in that you state that the tick eradication program was not completed until approximately July 1, 1943. The question then presents itself "Did the legislature intend to permit the restocking with deer after May 30, 1944?" or stating the question in another way "Did the legislature intend by Section 12 of said act to withdraw all duty and authority of the State Live Stock Sanitary Board or did the legislature mean to withdraw the authority to remove the deer and the authority of issuing special deer hunting licenses?" I find that the legislature in 1937 passed four special acts similar to the one in question, being Chapters 18548 (Glades county), 18576 (Highlands county), 18744 (Orange county) and 18751 (Osceola county) and each of the acts contained a provision that the authority therein granted was withdrawn at the expiration date of the act and the respective acts expired June 14, 1939, June 11, 1939, June 11, 1942 and June 14, 1942. The last two acts provided for the State Live Stock Sanitary Board to restock the area in the county with tick free deer but silent as to the period of time within which the restocking must be completed.

In my opinion the legislature did not intend to prohibit the restocking of deer in Collier county after the expiration date of the special act. This intent is evidenced by such facts as (1) in the general appropriation act for 1943 under necessary and regular expenses for the State Live Stock Sanitary Board there was included an item "of which for deer restocking \$25,000.00 as required by special acts" (Emphasis supplied); the legislature obviously regarding the deer restocking in these counties as a continuing obligation of the State Live Stock Sanitary Board; (2) the fact that there are not 36 months between the last date for hunting deer (October 31, 1941) and the expiration date of the act (May 30, 1944). My answer to your question is that the monies in the Collier county special deer license fund may be used for the purpose of restocking deer in that county during the present fiscal year.

My answer to your first question being in the affirmative disposes of your second question.

February 1, 1945.—045-20.

HOG CHOLERA SERUM AND VIRUS—EXHAUSTION OF APPROPRIATION

QUESTION: When the State Livestock Sanitary Board has exhausted its biennial appropriation for the purchase and free distribution of anti-hog cholera serum and hog cholera virus, are there any other state funds which the board can use legally for such purpose pending a new appropriation?

To the State Budget Commission:

By Chapters 21638 and 21741, Laws of Florida, Acts of 1943, (Sections 585.32 and 585.43, respectively, 1943 Cumulative Supplement to Florida

Statutes, 1941), the State Livestock Sanitary Board is "authorized and required" to purchase the anti-hog cholera serum and hog cholera virus and to distribute the same "without cost" to bona fide farmers, and for such purpose certain funds are appropriated and designated.

Based upon an examination of the provisions of our laws relative to the board and the appropriations made therefor by the last legislature, it is my considered belief that the only authority the board has for the purchase and distribution of the serum and virus without cost is granted by the statutes referred to in the preceding paragraph and that the funds appropriated and designated thereby are the only funds which can be legally used for such purpose.

In view of the foregoing, I am of the opinion that if the funds appropriated and designated by the aforesaid chapters have been depleted, there are no other state funds which can be legally employed by the board for the purchase and free distribution of the serum and virus.

April 28, 1945.—045-101.

ANTI-HOG CHOLERA SERUM AND VIRUS—APPROPRIATION

QUESTIONS: 1. Upon what date is the State Livestock Sanitary Board authorized to begin to distribute serum and virus under the provisions of House Bill No. 12 (Senate Bill No. 3), signed by the governor April 13, 1945, and filed in the office of the secretary of state on the same date?

2. What is the total amount of the appropriation available for the distribution of free serum and virus upon the date the board is authorized to begin to distribute said serum and virus?

3. Upon what date is the State Livestock Sanitary Board authorized to begin to distribute *Brucella Abortus* (Bang's disease), vaccine under the provisions of said bill?

4. What is the total amount of appropriation available for the distribution of free *Brucella Abortus* vaccine upon the date the board is authorized to begin to distribute said vaccine?

To Dr. J. V. Knapp, State Veterinarian:

In my opinion, your question should be answered as follows:

1. Section 4 of said bill reads as follows: "This act will take effect upon becoming a law." It follows, therefore, from the facts stated in your question, that the board is authorized and required to begin to distribute serum and virus under the provisions of said bill on April 13, 1945.

2. Section 1 of said bill reads in part as follows:

"(6) For the purchase and distribution of anti-hog cholera serum and hog cholera virus the sum of Two hundred thousand (\$200,000.00), Dollars is hereby appropriated annually out of any funds in the state treasury, including such sums as are now credited to the state live stock sanitary board in the Serum Fund."

It is my opinion that it was the intention of the legislature in the enactment of said bill to provide \$200,000 for the purchase and distribution of anti-hog cholera serum and hog cholera virus during the course of each and every calendar year, to wit: January 1 to December 31. In the light of the pressing need for said serum and virus at the time of the enactment of said bill, together with the language of Section 4 thereof, as set forth above, it follows that the legislature intended that such amount should be available for said purpose during the course of the present calendar year.

It is noted, however, that the bill in question is amendatory of Chapter 21638, Laws of Florida, Acts of 1943, Section 1 of which chapter appropriated \$175,000 annually for said purpose.

The sum of money available to the board for the purchase and distribution of anti-hog cholera serum and hog cholera virus upon the date the board was authorized to begin to distribute said serum and virus under the provisions of the bill in question, was therefore \$200,000, less such sums as had theretofore been credited to and spent by the board for said purpose, under the provisions of said Section 1 of Chapter 21638, during the course of the calendar year beginning January 1, 1945.

On January 1, 1946, an additional \$200,000 will become available to the board for said purpose and the same will be renewed annually thereafter as long as the present law remains unchanged.

3. Your third question is answered in the same manner as Question No. 1, above.

4. Section 2 of the bill in question is a new provision of law and reads in part as follows:

"(4) For the purchase and distribution of brucellosis (Bang's disease) vaccine the sum of fifty thousand (\$50,000.00) dollars is hereby appropriated annually out of any funds in the state treasury."

Construing the same in accordance with the intention of the legislature as outlined above under Question No. 2, it is my opinion that the sum of money available for the distribution of free *Brucella Abortus* Vaccine upon the date the board was authorized to begin to distribute said vaccine is \$50,000.00, and that an additional \$50,000.00 will become available to the board for said purpose on January 1, 1946, to be renewed annually thereafter as long as the present law remains unchanged.

My former opinion, rendered to you on April 22, 1943, (No. 043-107) is hereby overruled in so far as the same conflicts with the foregoing.

LEGAL FENCES

February 5, 1945.—045-25.

TRESPASS—HUNTING HOGS—CATTLE

QUESTIONS: 1. How can land be legally posted against trespass?

2. If land is posted against trespass, does that include hogs and cattle?

3. If farmers and cattlemen have their land fenced with three good strands of barbed wire, is there anything they can do about hogs rooting their pastures?

4. Can land owners keep owners of hogs from hunting and herding hogs on land that is fenced with three wires?

To Mr. Walter J. Sheely, Extension Animal Husbandman, Agricultural Extension Service, Gainesville, Florida:

By reason of our statutes, the Common Law rule which made it unlawful and a trespass for livestock belonging to one person to go on the unenclosed premises of another is not in force in this state.

1. As to trespass, our statutes require that lands, to be protected against trespass by persons, must be posted in at least three conspicuous places around the enclosure, where it is enclosed by a fence, and also posted in conspicuous places every 800 yards where the land is bounded

by a sea, gulf, bay, river, creeks, or lakes, and such notices must be kept in position where they can be seen. Section 821.06, Florida Statutes, 1941. Section 821.08 provides that it shall not be necessary to fence any boundary or part of a boundary of land which shall be formed by sea, gulf, bay, river, creek, or lake, and Section 821.07 provides that it shall not be necessary to give notice by posting on any enclosed tract not exceeding 200 acres on which there is a dwelling house. The posting may be accomplished by a sign bearing the word "Posted" in letters not less than two inches long and followed by the owner's name. This is in answer to your first question.

2. Your second question is answered in the negative. In order to have protection against hogs and cattle, it would be necessary to have the land enclosed by a legal fence. A legal fence, which would include fencing of cattle, horses, sheep, goats, swine, etc., is defined and described in Section 588.01, Florida Statutes, 1941, as follows:

"All fences or enclosures of land shall be substantially constructed, whether with rails, logs, post and railing, iron, steel, or other material, and not less than five feet high; to the extent of two feet from the ground there shall not be a space between the material used in the construction of any fence greater than four inches; provided, that when any fence or enclosure shall be made with a trench or a ditch, the same shall be four feet wide; and in that case the fence shall be five feet high from the bottom of the ditch to the top of the fence."

3. Under the above quoted statute, a three-strand fence could not be a legal fence as to hogs, and for this reason your third question is answered in the negative.

4. If, for the purpose of hunting and herding his hogs, the owner thereof entered land enclosed with a three-strand fence which was also posted in the manner set out above, he would be guilty of trespass. However, Sections 707.18 to 707.21 authorize the owner of any cattle or other domestic animals, or the agent of such owner, to enter upon the lands of another for the purpose of seeking or recovering such animals on giving notice to the owner of the land of the time and place where he desires to enter, and said sections make it the duty of the owner of the land to facilitate such entry, and also make it a misdemeanor for him to refuse entry under such circumstances, except that provision making it a misdemeanor has no application in counties where no fences are required.

As to Highlands and Glades counties, it would not be practicable to try to give you a complete analysis of all the special acts affecting your questions. There are eight special acts establishing "no fence" areas in Highlands county and two special acts establishing "no fence" areas in county. These special acts are similar in some respects and differ in others. They generally prohibit the roaming at large of cattle in the areas set up in the special acts. Some of them contain provisions, such as impounding fees, etc., similar to provisions in other special acts which have been held unconstitutional by our supreme court. The special acts setting up these "no fence" areas wherein cattle roaming at large is prohibited are as follows: Highlands county, Chapters 9459 and 9460, Special Acts of 1923; Chapters 10614 and 10619, Special Acts of 1925; Chapter 12840, Special Acts of 1927; Chapters 18577 and 18579, Special Acts of 1937; and Chapter 21285, Special Acts of 1941. Glades county, Chapter 10587, Special Acts of 1925, and Chapter 17545, Special Acts of 1935. In general, where there is a valid "no fence" law, the rights of owners of the property as to straying livestock are the same as if the land were properly fenced.

BOARD OF FORESTRY

July 25, 1946.—046-320.

FORESTRY LANDS—OIL AND GAS LEASES

QUESTION: Is the Florida Board of Forestry and Parks authorized by statute to lease lands acquired for forestry and park purposes for the development and production of the underlying gas and oil products?

To the Florida Board of Forestry and Parks:

All lands which the Florida Board of Forestry and Parks is authorized to acquire for forestry and park purposes are by statute dedicated to the public use of creation and development of state forests, and state parks, for recreational purposes.

Chapter 589, Florida Statutes, 1941, creates the Florida Board of Forestry and Parks and authorizes the acquisition of lands to be developed by the board for forest and park purposes.

The general principle of law is that lands dedicated to a specific public use may not be devoted to any other than the particular use specified. Any use inconsistent with the use of the property for the particular purpose to which it was dedicated or for other than a public purpose constitutes a misuser or diversion.

It is a firmly established principle of law that the legislature does not have power to authorize the use of a public park or other public development, for a purpose inconsistent with the purpose for which it was dedicated.

Chapter 22824, Laws of Florida, 1945, authorizing the various state departments or agencies of the State of Florida having title to lands to convey leasehold estates in said lands commonly known as oil and gas leases must be construed to mean the "fee simple" or "perfect title" to lands. The title by which the Board of Forestry and Parks holds lands is not the fee simple title but is a "qualified fee" impressed with a trust for the benefit of the public that the land shall be devoted only to the specified use of the development of state forests and state parks for rest and recreational purposes. The question is answered in the negative.

September 27, 1946.—046-406.

CONTRACT FOR FEEDING ANIMALS—FLORIDA PARK SERVICE

QUESTION: Can the Florida Park Service enter into an agreement to care and feed animals owned by private persons?

To Mr. Lewis G. Scoggin, Florida Board of Forestry and Parks:

(1) The Florida Park Service is but a department of the Florida Board of Forestry and Parks and as such is not authorized to enter into such contracts but is under your supervision and direction.

(2) You obligate yourself to the care and feeding of corralled hogs, which appears to be contrary to the provisions of Chapter 589, Florida Statutes, 1941, and in particular to Section 589.08 thereof, the particular provisions to which I refer

**** and the said board shall not in any manner or for any purpose pledge the credit of or obligate the State of Florida to pay any sum of money."

July 28, 1945.—045-205.

MEMBERS—TRAVELING EXPENSES

QUESTION: May the statutory amount fixed as the maximum expenditure of members of the Florida Board of Forestry and Parks for traveling expenses be relaxed to allow in excess of the statutory maxi-

mun to one member so long as the aggregate allowance for all members shall not exceed the maximum allowance multiplied by five?

To Honorable F. C. Elliot, Acting Director, Budget Commission:

Section 589.03, Florida Statutes, 1941, fixes as a maximum allowance for traveling expenses for each member of the board the maximum sum per year of \$300.00. This, being a special act applicable only to the members of the forestry board, takes precedence in its application to all other statutes dealing with allowance for traveling expenses.

Under the mandate of the statute, traveling expenses incurred by any member of the board in excess of the fixed maximum of \$300.00 per annum may not legally be vouchered.

July 24, 1945.—045-199.

ENTRY ON LANDS OF THE BOARD—AUTHORITY TO GRANT

QUESTION: Is a district forester authorized to grant permission to enter upon the lands of the Board of Forestry and Parks for the purpose of constructing a road, the construction of which has been authorized by the board, in the absence of express direction or authorization of the board?

To Honorable C. H. Coulter, State Forester and Park Executive:

The matter submitted with your inquiry in regard to the above question would indicate that the particular situation deals with permission given by a district forester to an applicant for an easement for road purposes over and across the lands of the State Board of Forestry and Parks, the particular location being known as the "Flagler Townsite," to commence the construction of the road without first having obtained the permission or authorization for such action from the board.

The district forester is employed to carry into effect such directions as may be given him by the executive of the board in relation to matters arising within his particular district.

The granting of a permit to and upon the lands of the forestry board for the purpose of exercising any right for the use or possession thereof does not come within the scope of the authority of a district forester. Such an entry can only be made upon the authority or at the direction of the board which, inasmuch as it involves the use and occupancy of lands, should be in writing.

August 4, 1945.—045-224.

FIRE LAW ENFORCEMENT—POWERS OF EMPLOYMENT

QUESTIONS: 1. May the Florida Board of Forestry and Parks employ a law enforcement officer for the specific purpose of enforcing the Forest Fire Laws?

2. Would an employee employed for the foregoing purpose have state-wide authority to make arrests in connection with violations of laws pertaining to forests?

To Honorable C. H. Coulter, State Forester and Park Executive:

This will acknowledge receipt of your letter of July 31, 1945, in which you request an opinion upon the two questions recited above. In answer to the first question, the provisions of Section 589.05, Florida Statutes, 1941, (which is the applicable section), authorize the Florida Board of Forestry and Parks, through the state forester, to take such action as is authorized by law and by the board, to prevent and extinguish forest fires, to enforce all laws pertaining to forests and wood-

lands, and to cause prosecution for any violation of said laws. This section further authorizes the board to employ such assistance, agents, clerks and employees as the board shall deem advisable. Under the provisions of this section the board is authorized to employ a law enforcement officer for the specific purpose of enforcing laws pertaining to forests and woodlands.

In answer to the second question propounded, the statutes of Florida have vested in certain officers and persons authority to make arrests, with or without warrants, of persons charged with the commission of crime. There is no statute vesting such authority in members or employees of the Florida Board of Forestry and Parks. Section 589.05, the provisions of which authorize the board to prevent and extinguish forest fires and to enforce all laws pertaining to forests and woodlands, is not sufficiently comprehensive to include authority to make arrests.

The second question is answered in the negative.

March 22, 1945.—045-80.

COMPTROLLER—AUTHORITY TO PAY ACCRUED INTEREST

QUESTION: Where the Florida Board of Forestry was without authority to increase the amount of payments prescribed in an agreement, or to pay the same from any other source than that designated in the terms of the agreement, may the comptroller issue a warrant for all interest accrued and charge the same to the state park fund?

To Honorable J. M. Lee, State Comptroller:

As requested by you, I have considered the terms and provisions of Chapter 589, Florida Statutes, 1941, and particularly Sections 589.07, 589.08 and 589.25. From the cited sections it appears that the board may acquire lands for forest and park purposes; that in so doing it may assemble a fund, 25 per cent of which shall be paid into the state school fund, and it is from this fund that the lands acquired are to be paid for, as shown by paragraph 2 of the agreement submitted, and to the extent of 30 per cent of the gross receipts collected from the use and operation of the land.

I have also considered Section 11, Article XVI, of the Constitution of the State of Florida, which reads as follows:

"Section 11. No extra compensation shall be made to any officer, agent, employee or contractor after the service shall have been rendered, or the contract made; nor shall any money be appropriated or paid on any claim, the subject matter of which shall not have been provided for by pre-existing laws, unless such compensation or claim be allowed by bill passed by two thirds of the members elected to each house of the legislature."

This section was doubtless introduced into the constitution to prevent changes in agreements affecting properties, both real and personal, acquired by the state under contracts.

From the foregoing, it is my opinion that the board is without authority to increase the amount of the payments prescribed therein, or to pay the same from any other source than that designated in the terms of the agreement, under which acquisition was accomplished, and for this reason I advise that you are not authorized to issue the requested warrant.

February 22, 1945.—045-67.

MYAKKA RIVER VALLEY RESERVOIR FOR SARASOTA

QUESTION: Does the Florida Forestry and Park Board have the authority to allow the City of Sarasota, Florida, to use the Myakka river stream as a means of supplying the City of Sarasota with drinking water?

To Honorable H. J. Malsberger, State Forester and Park Executive:

Your inquiry states that the Trustees of the Internal Improvement Fund have approved the transfer of the fee title to the board under the existing statutes, and, assuming that this transfer will be complete before negotiations are entered into with the City of Sarasota, I call your attention to the following sections of Florida Statutes, 1941. Section 589.09 provides as follows:

"Use of lands acquired.—All lands acquired by the board on behalf of the State of Florida shall be in the custody of and subject to the jurisdiction, management and control of the said board, and, for such purposes and the utilization and development of such land, the said board may use the proceeds of the sale of any such lands, save the twenty-five per cent of such proceeds which shall be paid into the state school fund as the constitution requires, and such other funds as may be appropriated for use by the board, and in the opinion of such board, available for such uses and purposes."

Section 589.21 provides in part:

"All state forests, state parks, and reforestation projects mentioned in this chapter shall be managed and administered by the board in the interests of the public. . . ."

Section 589.25 provides:

"Fees for use of state parks.—(1) The 'Florida board of forestry' shall have the power to charge reasonable fees, rentals or charges for the use of operation of facilities and concessions in state parks, and all such fees, rentals and charges so collected shall be deposited in the state treasury to the credit of 'state park fund,' which is hereby created, the continuing balance of which fund is hereby appropriated to be expended by said board for the administration, improvement and maintenance of state parks and for the acquisition and development of lands hereafter acquired for state park purposes. The appropriation of said fund shall be continuing, and shall not revert to the general revenue fund at the end of any fiscal year or at any other time but shall, until expended, be continually available to said board for the uses and purposes set forth.

(2) Any moneys received in trust by the Florida board of forestry by gift, devise, appropriation or otherwise shall, subject to the terms of such trust, be deposited with the state treasurer in a fund to be known as the 'Florida board of forestry trust fund,' and shall be subject to withdrawal upon application of said board for expenditure or investment in accordance with the terms of said trust. Unless prohibited by the terms of the trust by which said moneys are derived, all of such moneys may be invested from time to time by said board in such securities as trust companies organized under the laws of this state are permitted to invest in."

I am of the opinion that the board would have authority upon receiving title to the land to grant concession privileges.

The Myakka State Park was deeded to the Trustees of the Internal Improvement Fund from Trustees Honore' Palmer and Potter Palmer as trustees under the last will and testament of Bertha Honore' Palmer.

deceased, under date of October 3, 1934, and recorded in deed book 129 at page 156 of the public records of Sarasota county, Florida. This deed, conveying about 1,900 acres of land in the said Myakka Park contained the following covenant:

"... upon the express condition as a covenant running with the land that the premises conveyed shall be used only as a state park and/or game preserve and for no other purposes and upon ceasing to be so used in whole or in part this conveyance becomes and remains void and of no effect against the parties of the first part and the title to said premises shall thereupon, revert to said parties of the first part, with the right to reenter and repossess the same as of their first and former estate."

Inasmuch as this covenant was in the deed, it is my opinion that it must be respected, and a written approval from the trustees under the last will and testament of the said Bertha Honore' Palmer should be obtained in the nature of a waiver of a reverter clause to the deed.

REGULATIONS OF SALE OF CITRUS FRUITS

September 16, 1946.—046-403.

CITRUS FRUIT DEALERS—LIABILITY

QUESTIONS: 1. If a licensed citrus fruit dealer permits, either through ignorance or in defiance of the law, an unlicensed citrus fruit dealer to market citrus fruit in the licensed dealer's name and the producer of the said fruit has not been paid for same or the fruit has been stolen from the owner, who is not the producer, is the dealer's cash bond or surety bond liable in either instance?

2. Is a citrus canner, licensed as a citrus fruit dealer, who purchases citrus fruit from Mr. X, not a producer, who in turn purchased from a producer but failed to pay for said fruit, the canner failing to keep accurate records as required by Section 596.16, Florida Statutes, 1941, liable to the producer on his dealer's bond?

3. A person secures a regular citrus fruit dealer's surety bond to engage in the business as a citrus fruit dealer but fails to secure a license as such. He engages in the business as such a dealer, exhibiting his surety bond to producers and purchasing citrus fruit from them but fails to pay the producers for the fruit. Is the surety liable to the producer?

4. Is a dealer in Persian limes subject to the operation of the citrus bond and license law in view of the fact that such dealer always prior hereto operated under a license procured under the provisions of Section 604.17, Florida Statutes, 1941?

To Honorable Nathan Mayo, Commissioner of Agriculture:

Your first, second and third questions do not call for an administrative construction of the law and do not come within the field for my interpretation.

Answering your fourth question,

"'Citrus fruit' means any fruit of the citrus family and includes grapefruit, lemons, limes, oranges and tangerines;" Section 594.01(1), Florida Statutes, 1941.

"No person shall act as a citrus fruit dealer in this state without first having obtained a license for each shipping season." Section 596.02, Florida Statutes, 1941.

My answer to your fourth question is that such dealer because of his dealing in limes is subject to the bond and license requirements of the law.

CITRUS ADVERTISING

October 2, 1946.—046-433.

SAMPLE GRAPEFRUIT CANS—SHIPMENT—PAYMENT

QUESTION: Is there any authority for the payment of an invoice of the Florida Citrus Commission covering the cost of purchasing and mailing 800 packages of grapefruit juice in the circumstances herein-after set forth?

To Honorable J. M. Lee, State Comptroller:

It appears from your file that each of the aforesaid packages contained two cans of unsweetened grapefruit juice and two cans of sweetened grapefruit juice and that said grapefruit juice was unidentified or labeled except for the marking "J" or "K" to distinguish between the sweetened and unsweetened juice; that said packages were shipped from Frostproof, Florida, and a questionnaire prepared by the commission's advertising agency was enclosed in each package and also a letter drafted by such agency explaining the purpose of the questionnaire and giving instructions as to the use of the grapefruit juice and the proper method of filling out the questionnaire.

In a letter addressed to you by the advertising manager of the commission and included in your file we find the following statement concerning the project:

"This survey was conducted with two major objectives in mind; first, to provide the Florida citrus canning industry with authentic information on consumer preferences for the sweetened and unsweetened grapefruit juice in order that they may be guided in their proportionate production of each item; and second, to provide the commission's advertising department and its advertising agency with pertinent information and data on consumer reaction to both the sweetened and unsweetened juice which will permit the most effective planning for the advertising and promotion of these products."

In so far as grapefruit are concerned Chapter 599, Florida Statutes, 1941, Citrus Advertising, was derived immediately from Chapter 17780, Laws of Florida, 1937, and the purpose of such chapter is revealed in part by that portion of its title reading:

"AN ACT to Conserve and Promote the Prosperity and Welfare of the Florida Citrus Industry and of the State of Florida by Promoting the Sale of Grapefruit Produced in Florida Through the Conducting of a Publicity, Advertising and Sales Promotion Campaign to Increase the Consumption of Such Grapefruit; to Levy and Impose An Excise Tax on Grapefruit Produced in Florida and to Provide for the Collection Thereof; to Create a Grapefruit Advertising Fund; to Vest the Administration of this Act in the Florida Citrus Commission and to Provide for the Powers, Duties and Authority of Said Commission Hereunder. . . ."

Strictly speaking it would seem that the survey was conducted to secure information rather than to proclaim it and in this aspect of the situation the survey could hardly be called publicity or advertising; however, it is revealed that the information was obtained for dissemination among the citrus canning industry of Florida and for use by the commission's advertising agency as stated above and that in any event the information will ultimately be employed to promote the sale of grapefruit juice canned in Florida.

A consideration of the powers and duties of the commission under Chapter 599 as contained in Sections 599.03, 599.04(9), 599.15(3) and (5), as well as the general powers of the commission provided by Section 595.07(2) and (6), indicates that the commission is empowered to incur an obligation such as that about which you inquire and have such obligation paid, provided there are funds authorized by law for such a purpose.

Section 599.09, relative to the disbursement of excise taxes levied and collected under the provisions of Chapter 599, Section 595.35; regarding the appropriation for citrus research and Section 595.25, respecting the payment of salaries, costs and expenses incurred by the commission in the performance of its duties and the exercise of its powers under the Laws of Florida were all amended by the 1945 legislature by Chapters 22528, 22526 and 22529, respectively. When these chapters are read together and examined in the light of the statutes referred to in the preceding paragraph, it seems evident, and it is my opinion that Section 595.25, as amended by Chapter 22529, is authority for the payment of the invoice in question.

MARKETING BUREAU AND BOARD

August 6, 1946.—046-337.

STATE MARKETS—FUNDS FOR ADDITIONS

QUESTION: May funds be supplied from the building fund established by Chapter 22820, Acts of 1945, for additions to state farmers' market buildings?

To Honorable Nathan Mayo, Commissioner of Agriculture:

In your letter of August 5 you state: "We have several state farmers' markets that are needing additions to their buildings in order to cope with the increased business that they are receiving from our farmers. The present law gives the department of agriculture authority to spend surplus funds, not otherwise necessary for the department's operations, to build state farmers' markets. We now have some twenty-five of these markets in the state which have been built from these proceeds. However, the department is not now in a financial position to make these critically needed additions."

Section 603.16 creates the State Agricultural Marketing Board consisting of the governor, the commissioner of agriculture and the state marketing commissioner. That section authorizes the State Agricultural Marketing Board

"to acquire suitable sites and erect thereon necessary marketing facilities, live stock pens and properly equip, maintain and operate same for the handling of all staple field crops, meats, fruits and vegetables, poultry and dairy products, and all farm and home products, and for selling and loading live stock, and to let or lease space therein and thereon."

All collections by the board are deposited in the general inspection fund in a special state farmers' market account and used toward the payment of expenses of operation and maintenance and equipment of the markets. The section further provides:

"Any additional funds necessary to defray the expense of erecting, equipping, maintaining and operating plants and pens shall be expended from the general inspection fund, provided that only such funds shall be used for the erection and equipment of plants and pens as are available after all other needs of the department of agriculture have been provided for."

Some time since, and pursuant to Sec. 2 of Chapter 22820 of the Laws of 1945, the State Budget Commission determined that there was

a surplus or balance in the general inspection fund of \$300,000 over and above the needs of the department of agriculture and, with the approval of the governor, transferred such surplus into the state building fund established by Chapter 22820.

Section 2 of Chapter 22820 (Section 282.25 (2) Cum. Supp.) contains the following proviso:

"PROVIDED, HOWEVER, that if as a result of emergency or unforeseen circumstances affecting any department, there shall be insufficient funds to meet the requirements of said department caused by setting aside part of its balance or surplus, the Budget Commission shall again ascertain and determine the needs thereof and shall withdraw from said building fund so much as may be deemed necessary, not in excess of the amount set aside from the funds of said department during that current fiscal year, and shall restore the same to the credit and use of the said department, and"

The surplus funds at any time in the general inspection fund are appropriated by Section 603.16 for market buildings, etc., and such surplus in the general inspection fund must be exhausted before any funds of the state building fund can be used for such purpose.

Accordingly, application should be made to the budget commission for re-transfer to the general inspection fund of all or any part of the \$300,000 which may now be needed for additions to the state farmers' market buildings, whereupon the budget commission has the duty of again ascertaining the needs of the Department of Agriculture and make re-transfer to the general inspection fund of such amount, up to \$300,000, as they may determine the needs of the agency to be, including needs for such additions to the farm markets.

Your letter does not state whether the present requirement for additions to the markets will exceed the amount transferred from the general inspection fund to the state building fund. The State Agricultural Marketing Board is a state agency and its housing and facility needs are therefore entitled to the benefits of Chapter 22820, as may be determined by the Board of Commissioners of State Institutions. While these farm markets are not listed in Groups A, B or C of the Building Fund Act, I have heretofore held that the Board of Commissioners of State Institutions are not confined to such projects as are listed in those three groups but are authorized, within funds available in the building fund, to provide for other buildings and facilities of state agencies. Therefore, in the event the need for additions to farm markets exceeds the \$300,000 which may be re-transferred as set out above, application may be made to the Board of Commissioners of State Institutions to supply from the building fund such sum as may be needed in addition to the \$300,000, and the board of commissioners may in their sound discretion allocate such additional amount from the state building fund.

April 26, 1946.—046-175.

PROPERTY INSURANCE—STATE FUND

QUESTION: Is property of the State Agricultural Marketing Board comprising marketing facilities and equipment in connection therewith, erected and acquired by said board, as described in and contemplated by Section 603.16, Florida Statutes, 1941, property of the state which should be insured in the state fire insurance fund?

To Honorable J. Edwin Larson, State Treasurer:

Application has been made by the above board to the state treasurer for insurance of certain of its property in the state fire insurance fund. The property consists of improvements and betterments constituting marketing facilities, acquired, erected and equipped for the handling and

sale of agricultural and horticultural products and livestock, as contemplated by Section 603.16, Florida Statutes, 1941. You advise me that it appears that this property is located at approximately twenty-eight different sites in Florida; and that the board has valued such real property and equipment in the amount of \$1,314,500.

At first glance, it would appear that according to the express statutory language of Sections 284.01 and 284.04, Florida Statutes, 1941, this property is insurable in the state fire insurance fund. However, a reading of Chapter 284, Florida Statutes, 1941, would seem to negative such assumption.

Under said Section 603.16 said board has the power "to let or lease space" in any of such facilities or on the property where located. This power could be exercised to lease all or any part of any particular building or structure comprising a part of such facilities.

It is evident it was the legislative intent that the state fire insurance fund should be established, maintained and administered on a solvent basis, even though Section 284.03, Florida Statutes, 1941, permit the invasion of the general revenue fund and use of moneys therein available if there is a deficit in the state fire insurance fund. If property is insurable in this fund, the state has no right of choice of risks or right to cancel insurance on property insured in the fund, as such rights may and are required to be exercised from time to time by fire insurance companies in the interest of their financial security. The integrity of that fund is protected by the duty of the state treasurer to inspect property insured in said fund and his right to require that hazardous conditions be remedied or removed, all as provided by Section 284.05, Florida Statutes, 1941. Any use of state property which would interfere with the effectiveness of this required inspection of state property would materially abridge the one method of preserving the integrity of said fund.

The right of the state agricultural marketing board to lease all or any part of said buildings or structures to individuals, firms or corporations, removes to a substantial degree the control of the state over the day by day use of said property by lessees in their enterprises conducted therein. The use of said property by such lessees would materially abridge the right of the state treasurer to require the removal or lessening of fire hazards with respect thereto. Furthermore, whereas reasonably there may be anticipated the character and incidence of fire hazards in the use of property for strictly state purposes, the use of said board's properties by such lessees reasonably might be productive of fire hazards from time to time which the state treasurer could not anticipate. While these facilities are properties of a state board and are state properties, their probable use is such as to place them in a status different from that of property owned, controlled, used and occupied for strictly state purposes.

In view of the foregoing, in my opinion the above question must be answered in the negative, that is to say, that such property of the state agricultural marketing board as described in the above question is not state property which properly is insurable in the state fire insurance fund.

CHAPTER XXX

CORPORATIONS AND BUSINESS TRUSTS

CORPORATIONS, GENERAL PROVISIONS

August 2, 1946.—046-330.

NAME—USE OF "CLUB"

QUESTION: In the forming of a corporation in Florida, is it lawful to use the word "club" in the proposed corporate name "Cliquot Club Bottling Company of Orlando" in view of the provisions of Sections 610.31-610.36, Florida Statutes, 1941?

To Honorable R. A. Gray, Secretary of State:

Section 631.31 provides that it is the public policy of the State to prevent misrepresentations and abuses arising from use of the word "club" as a name, designation or style for corporate or other forms of business ventures conducted for profit, so that such ventures may not, as a means of soliciting patronage, be misrepresented and foisted upon federal, state or municipal governments or the public under the guise of social, religious, educational, political, benevolent or similar associations or non-profit corporations to achieve tax benefits or other preferences or advantages intended only for bona fide organizations having merely social, religious, educational, political, benevolent and/or other similar non-profit purposes, and conducted solely by and in behalf of its members.

Section 610.32 defines the term "club," and the type of organization with respect to which the term may be used; and provides that such word may "not be used or employed as a trade name or as a designation or style for business ventures or enterprises, or as a guise for commercial activities, operated for financial profit," with the proviso that such prohibition shall not apply to certain racing, jockey or kennel clubs, as therein described.

Section 610.33 provides, in part, that from and after three months after the date such Chapter 20840 became a law "it shall be unlawful for any person, firm or corporation, directly or indirectly, to do business for profit under any trade name or designation or style which includes the word or term "club."

Section 610.36 provides that any person, firm, association, or corporation violating any provision of Sections 610.31-610.35 shall be guilty of a misdemeanor and upon conviction fined not to exceed \$1,000 or imprisoned in the county jail not to exceed six months, or both, in the discretion of the court.

"Cliquot Club" is recognized as a nationally known trade name of certain bottled products, just as the names "Coca Cola," "Pepsi-Cola" and "Dr. Pepper" are nationally known trade names associated with such products. The most gullible or credulous rational person could not construe the name "Cliquot Club Bottling Company of Orlando" as indicating an intended representation that its purposes and activities should be accepted as those of a "club," as such term is used in said Sections 610.31-610.36. On the contrary, if the purpose of the proposed corporation is to be gathered from its name, it is that the corporation intends to engage in the bottling business.

In view of the foregoing, in my opinion the above question properly is answered as follows:

The use of the word "club" in the proposed corporate name "Cliquot Club Bottling Company of Orlando" would not seem to be prohibited or rendered unlawful by virtue of the provisions of Sections 610.31-610.36, Florida Statutes, 1941.

CORPORATIONS FOR PROFIT

March 19, 1945.—045-70.

"STATE"—USE OF WORD IN NAMES OF PRIVATE FIRMS

QUESTION: May the use of the word "State" by firms and private corporations be prohibited by the Board of Commissioners of State Institutions, unless special permission is obtained from such board, on the ground that the general public may assume from the use of such name in its title that such firm or private corporation is either approved or sponsored by the state?

To Honorable John T. Wigginton, Secretary, Board of Commissioners of State Institutions:

It appears that we have nothing in our statutes which could be construed as prohibiting the use of the word "State" in the names of firms and corporations. It seems that the Board of Commissioners of State Institutions would have no authority to prohibit or acquiesce in the use of such word as contemplated in the above question. Hence, it is my opinion that the above question should be answered in the negative.

If the use of the word "State" in the name of a firm or corporation may lead the public to believe that such enterprise is approved by, or sponsored by, the state, the police power of the state may be invoked through appropriate legislation. *Surf Club v. Tatum Surf Club, Inc.*, 10 So. 2d. 554. And if in such legislation the police power is properly invoked, the law would be applicable to firm or corporate names in use at the effective date of such a law. *Surf Club v. Tatum Surf Club, Inc.*, supra. It should be borne in mind, however, that the validity of a police regulation, generally speaking, depends upon a requirement of public welfare which reasonably demands the protective and remedial features of the law enacted.

December 4, 1946.—046-495.

REINCORPORATION—CONSENT OF STOCKHOLDERS

QUESTION: What per cent of the stockholders of a corporation for profit organized under the law existing prior to enactment of 1925 corporation law, is necessary to authorize reincorporation under said latter law?

To Honorable R. A. Gray, Secretary of State:

The 1925 corporation law, with amendments, now appears as Chapter 612, Florida Statutes, 1941. The corporation law existing prior to the enactment of the 1925 law, with amendments, is now found in Chapter 611, Florida Statutes, 1941.

Section 612.64, Florida Statutes, 1941, provides, in part, that any corporation organized and existing under the laws of the state on July 15, 1925, may reincorporate, under said Chapter 612 in the manner and subject to the conditions therein set forth, among which is the requirement that such action shall be "duly authorized by a meeting of the stockholders called for that purpose." No other section of our laws appears to touch upon the necessary action of stockholders with respect to such reincorporation.

Section 611.26 provides the method for altering or amending the charter of a corporation organized under the old law, and which, among other things, requires "a vote of three-fourths of all its stock at a meeting held for that purpose"; and Section 611.28 provides an additional method for the amendment of such a charter, and which, under the circumstances therein set forth, requires the consent of "four-fifths of the capital stock" of such a corporation. But it is not felt that reincorporating under said Chapter 612 is such an "alteration" or "amendment" of a charter and is contemplated by said Sections 611.26 and 611.28.

In view of the foregoing, in my opinion the above question properly is answered as follows:

Since said Section 612.64 requires that reincorporation as therein provided be authorized "by a meeting of stockholders called for that purpose" without further particularity, and no other provision of law seems to touch upon the necessary action of such stockholders, it would seem reasonable that said quoted words contemplate authorization by stockholders holding a majority of the voting stock of the corporation.

October 2, 1946.—046-419.

AMENDMENT OF CHARTER—METHOD

QUESTION: What laws prescribe the procedure for amendment of the charter of a corporation organized prior to July 15, 1925, under the corporation laws then existing and which laws, with amendments, thereto, now constitute Chapter 611, Florida Statutes, 1941, and which corporation is not a corporation incorporated, consolidated or reincorporated under Chapter 612, Florida Statutes, 1941, or under Chapter 10096, Laws of Florida, Acts of 1925?

To Honorable R. A. Gray, Secretary of State:

In my opinion, the above question properly is answered as follows:

Such a corporation described in and contemplated by the above question may amend its charter only in the manner set forth in Sections 611.26 or 611.28, Florida Statutes, 1941. (See Sections 612.01, 611.26, 611.28, 611.40, Florida Statutes, 1941). Hence, it would not appear to be in order for you to accept and file as an amendment to the charter of such a corporation a purported amendment effected under the procedure set forth in Section 612.06, Florida Statutes, 1941.

AGRICULTURAL COOPERATIVE MARKETING ASSOCIATIONS

September 4, 1945.—045-277.

TAXATION OF PROPERTY AND CAPITAL STOCK

QUESTIONS: 1. Is the real and personal property of agricultural cooperative marketing associations incorporated under Chapter 618, Florida Statutes, 1941, subject to taxation in this state?

2. Is the capital stock issued by such marketing associations subject to taxation, and such as should be returned by the owners and holders thereof for taxation?

To Honorable J. M. Lee, State Comptroller:

To your request for an opinion was attached the charters of an agricultural cooperative association and a growers' association, each of which appears to have been incorporated under Chapter 618, Florida Statutes, 1941, or prior laws.

Under Chapter 618, Florida Statutes, 1941, associations may be incor-

porated for the purpose of engaging in cooperative activities in connection with the growing, producing, harvesting, marketing, selling, etc., of agricultural products. Such associations are for the mutual benefit of their members and the return on their stock is limited to eight per cent per annum. These associations seem to be deemed "nonprofit" in that they are not organized to make a profit for themselves, as such, but only for their members as producers (see Sections 618.01 and 618.06, Florida Statutes, 1941). However, they do not appear to be either charitable or eleemosynary corporations.

Under the state constitution property used for municipal, educational, literary, scientific, religious or charitable purposes may be exempted from taxation (see Article IX, Section 1). Under the statutes "such property of education, literary, benevolent, fraternal and scientific institutions . . . as shall be actually occupied and used by them for the purpose for which they have been or may be organized" is exempted from taxation; and "all property, real and personal, held by and belonging to any agricultural society in this state, and used exclusively for the meetings and exhibits of such society" is exempted from taxation (see Section 192.06, Florida Statutes, 1941).

Agricultural marketing associations, under the laws of this state, are associations of persons engaged in agriculture or some of its activities and have no right to make a profit out of the handling or sale of the products handled by them. The whole conception of such associations is that of a marketing association for the purpose of advantageous marketing of the products of its members; not for the benefit of the association, but for the benefit of its members. It is in the nature of a sales agency for its members. It acts in the nature of a broker in sales between its members and the purchasers. The property which is the subject matter of sales by it for its members should not be considered as its property for taxation. Property owned outright by it and used in carrying on its business might be the subject of taxation unless exempted by some statute or law.

The property owned outright by the association and used in carrying on its business does not appear to be used for "municipal, educational, literary, scientific, religious or charitable purposes"; neither is it property of an agricultural society "used exclusively for the meetings and exhibits of such society."

Shares of stock or interests in such associations appear to represent an interest in the association and its property so as to entitle the holder to a share in any profits that may be made by the association and a share in its assets upon dissolution. Such share or interests would seem to be "intangible personal property" within the purview of Chapter 199, Florida Statutes, 1941. When held by persons engaged in agriculture, such shares or interests are not "property belonging to any religious, charitable, benevolent or educational association" so as to be exempt from taxation.

In my opinion each of the above stated questions should be answered in the affirmative; provided, however that agricultural products in the hands of such associations for sale or distribution for its members should not be considered as property of the association.

UNIFORM LIMITED PARTNERSHIP LAW

August 10, 1946.—046-343.

REQUIREMENTS—INTEREST OF PARTNERS

QUESTION: A partnership agreement purportedly was entered into on November 1, 1943 between B. F. Weaver, M. A. Weaver and E. R. Akins for the purpose of forming a partnership under the name of B. F. Weaver Company, Miami, Florida. Should said partnership be classed as

a limited partnership and if said partnership is so classified, are the interests of the partners intangible property under the laws of Florida?

To Honorable J. M. Lee, State Comptroller:

I have examined the aforesaid agreement carefully and it appears to me that it was not intended to be a limited partnership certificate. Many of the legal requisites for a limited partnership as contained in Chapter 620, Florida Statutes, 1941, as amended (Uniform Partnership Law), are not contained in the agreement, but in this connection suffice it to mention that it has not been sworn to, the name of the partnership does not contain the word "Limited" or its abbreviation "Ltd." and I find, upon inquiry at the office of the secretary of state, that no certificate has been filed for record in such office.

It is my opinion, therefore, that the agreement in question is not a limited partnership certificate and that any partnership created by such agreement is not a limited partnership; consequently, it becomes unnecessary to answer your second question.

CHAPTER XXXI

INSURANCE

GENERAL PROVISIONS

November 4, 1946.—046-444.

LICENSE OF AGENT—GROUNDS FOR CANCELLATION

QUESTION: Under the facts as set forth below, is the state insurance commissioner warranted in conducting a hearing to determine whether the license of Virgil D. Wright, insurance agent, should be cancelled?

To Honorable J. Edwin Larson, Insurance Commissioner:

Considering this additional information with the photostatic copies of affidavits attached to your letter of August 31, 1946, it would seem that there exists sufficient showing to warrant your holding a hearing, under Section 627.31, Florida Statutes, 1941, to determine, after due notice, hearing and proof adduced, as in said section provided, whether or not the license of this agent should be cancelled, because of certain of the following particular transactions:

Elmer Glenn Kelley Insurance:

It appears from this person's affidavit that he took out an original Franklin policy providing for annuity at the age of 65; that upon certain representations of Mr. Wright, as set forth in the affidavit, he accepted a new policy from Franklin which provided an annuity at age 55, dropping the first policy; that in connection with this transaction, and upon the inquiry of Kelley if the new policy was not costing him more because of another commission on the new contract, Wright paid him \$166 in cash.

In your file is original policy issued to Mr. Kelley, as described above in paragraph (2), specimen policy described above in paragraph (5), and two specimen policies described above in paragraph (6), one of which appears to be the same as the original policy in paragraph (2). It is assumed that the old policy surrendered was No. 523090, and that two new policies were issued on March 12, 1946, numbered 562550 and 562551. **This assumption should be verified.** Assuming these are the policies involved in the transaction described by Mr. Kelley in his affidavit, then it would appear that the payment of the \$166 was an inducement for insurance as described in Section 625.19, Florida Statutes, 1941.

Robert Stephen Allen Insurance:

Generally, the results effected with respect to this transaction as found in this affidavit are similar to those found in the above Kelley Transaction; the affiant stating that at the time he accepted the new contract, Mr. Wright paid him \$214.56 representing approximately one-half the premium affiant had paid on the old contract, which was dropped.

It is assumed that the old policy involved in this transaction was policy No. 521154 (see paragraph (7) above), and that two new contracts involved are policies numbered 563282 and 563283 (see paragraphs (4) and (8) above). **This assumption should be verified.** Assuming those are the contracts involved in the transaction described by Mr. Allen in his affidavit, then it would appear that the payment of the said \$214.56 was an inducement for insurance as described in Section 625.19, Florida Statutes, 1941.

Warren Hayden Ward, Jr., Insurance:

This person's affidavit is to the effect that Mr. Wright proposed to affiant that the latter should surrender his Franklin policy (see para-

graph (1) above) providing life insurance annuity at age 65, whereupon Mr. Wright would cause to be issued to deponent a policy providing life insurance annuity at age 55, and that Mr. Wright offered to reimburse deponent one-half the premiums paid by him on such policy. The affiant did not accept a new policy. Such proposal would appear to have been an inducement for insurance as described in Section 625.19, Florida Statutes, 1941.

Arrangement with Credit Union:

The report of your investigation would indicate that the Panair Credit Union received \$100 per month from Mr. Wright, agent for Franklin Life Insurance Co., for handling payroll deduction plan through the credit union. The deductions are made from salaries of employees by authority of employees on a salary deduction card. The credit union receives a check from Pan-American treasurer in the amount of total deductions for insurance and bonds or savings. The credit union then renders one check and an attached statement monthly to Franklin Life Insurance Co., covering all insurance deductions for the month. The nature of the coverage by Franklin is general life insurance,—endowments, annuities, etc.

The report further sets forth that the president of Eastern Airlines Miami Employees Federal Credit Union advised the investigator that his organization was handling the payroll deduction for Franklin, but had not as yet received any payment for this service since the Eastern Airlines legal department was checking the arrangement first; that Mr. Wright had agreed to pay half the salary of one of the credit union employees when the arrangement was completed, which, as the investigator believed, would amount to \$75 per month.

It is not apparent whether such sums for said services are paid or may be paid by Mr. Wright or Franklin.

Conclusions:

(1) Subject to verifying the policies involved, there would seem to be indicated in the information furnished that the insurance transactions with Kelley, Allen and Ward, above mentioned, involved the payment of money or the promise to pay money, as an inducement for insurance as such is expressed in Section 625.19, Florida Statutes, 1941.

(2) Whether or not there was any misrepresentation on the part of Mr. Wright in connection with the Kelley and Allen transactions as to constitute "misleading representations or incomplete or fraudulent comparison of any policies or contracts or concerning any companies to any person for the purpose or with the intention of inducing such person or persons to lapse, forfeit or surrender his insurance then in force," as such words are used in Section 627.31, Florida Statutes, 1941, cannot be decided from the Kelley and Allen affidavits. A more detailed understanding of the facts of such transactions is required to determine this question.

(3) Section 627.18, Florida Statutes, 1941, would seem to apply to life insurance agents. Under this section, agents are authorized to divide commissions with only those licensed insurance agents or solicitors described therein. However, the exception of life insurers from the effects of Sections 627.19 and 627.20, raises a question as to the construction to be placed upon Section 627.18 in relation to life agents. It would be proper, if you desire it, to request an opinion of the construction to be placed upon said Section 627.18 in the light of the arrangements found here with the credit unions mentioned above, for the guidance of all life agents. However, even though it should be found that the payments here involved have been made by Mr. Wright and not the Franklin Insurance Co., it is not recommended that any such arrangements which may have been entered into by said agent with such credit unions be considered in connection with your investigation of him, in view of the purposes of such investigation and the doubt above expressed.

(4) The conclusions reached above are based upon the information you have furnished me. Such conclusions are not to be construed as findings that this agent engaged in any conduct which would warrant cancellation of his license; but are to be accepted as indicating that on the basis of information afforded, properly proceedings may be brought by you to inquire into the question of whether or not this agent's license should be cancelled, as provided in Section 627.31. Any charges thereunder which might be made against this agent should be clearly set forth; and, of course, cancellation of an agent's license is warranted only after positive proof of proper charges has been secured on a full and complete investigation; and cancellation cannot rest on partial inquiry or inconclusive circumstantial evidence. See *State vs. Knott* (Fla.), 166 So. 835.

July 20, 1945.—045-184.

MUTUAL INSURANCE COMPANIES—AUTOMOBILE RISKS

QUESTION: May a mutual insurance company be organized under Florida law with charter and license authority to issue policies covering all automobile risks (fire, theft, collision, bodily injury, property damage, public liability), ordinary fire and related lines of insurance, and workmen's compensation insurance?

To Honorable J. Edwin Larson, Insurance Commissioner:

The chapter and section numbers as used herein refer to Florida Statutes, 1941, unless otherwise indicated.

Corporations are creatures of the statutes and unless there exists statutory provision for creation of an insurance corporation under the mutual plan, it cannot be done.

Section 625.02 provides that every insurance or surety company incorporated under the laws of this state, unless otherwise expressly provided, shall have not less than \$100,000 capital stock divided into shares of par value of not less than \$10 nor more than \$100 each.

A mutual company has certain characteristics, among which are the following: members thereof are both the insurers and insured, usually organized on assessment plan and without capital stock; each person insured becomes a member and members reciprocally engage to indemnify each other against losses, which losses ordinarily are paid by assessments against members; and members share proportionately in the profits and losses. *Union Ins. Co. vs. Hoge*, 16 L. Ed. 611; *Penn Mutual Life Ins. Co. vs. Lederer*, 64 L. Ed. 698; *Equitable Life Assurance Society vs. Bowers*, 87 Fed. 2d. 687.

Chapter 632, as amended, provides for the organization of domestic mutual fire insurance companies. Under the provisions of Section 632.08, as amended, such an organization is authorized to write, subject to the limitations and conditions prescribed, risks against loss or damage by fire, lightning, hail, tempest, drought, freeze, insects, disease, earthquake, explosion, fire ensuing an explosion, no fire ensuing except explosion by steam boilers or flywheels; against loss or damage by water, caused by the breakage or leakage of sprinklers, pumps, or other apparatus, water pipes, plumbing, or their fixtures erected for extinguishing fires, and against accidental injury from any cause to such sprinklers, pumps, other apparatus, water pipes, plumbing, or their fixtures, erected for extinguishing fires; the risks of inland transportation and navigation; and to make insurance upon automobiles, whether stationary or operated under their own power, against loss or damage, by any of the causes or risks specified in this section, including explosion, transportation, collision, liability for damage to property resulting from owning, maintaining or using automobiles, and including burglary and theft, but not including loss or damage by reason of bodily injury to the person.

It is evident from the above that certain of the risks contemplated by the above question cannot be insured against by a company organized under Chapter 632, among which are public liability, injuries to the person, and compensation insurance, and we have no other statute for incorporation of a mutual insurance company to issue policies for such risks not included in Section 632.08.

Reference is made to Chapter 618 providing for the incorporation of agricultural cooperative marketing associations. The activities which such an organization may engage in are as follows: those connected with producing, marketing, etc., or agricultural products; the growing, harvesting, packing, etc., of such products, or the manufacturing or marketing of by-products thereof; or in connection with any of the activities mentioned in said section, the manufacturing, selling or supplying of machinery, equipment, or supplies; or in the financing of any such activities; "or in performing or furnishing business or educational services, on a cooperative basis for those engaged in agriculture as bona fide producers of agricultural products, or in any one or more of the activities" specified in said section. A study of such section and of Chapter 618 leads me to the conclusion that "insurance" on a cooperative basis is not an activity within the meaning of the words "furnishing business" as used in said section.

Attention is further directed to the fact that on March 30, 1944, I issued an opinion (No. 044-107) to the effect that we then had no law which would authorize citrus growers to transact an insurance business on the mutual plan for the protection of its members against loss by frost and cold.

In view of the foregoing, in my opinion the above question is properly answered as follows:

The only law which we have, permitting the organization of a mutual insurance company to write any of the insurance contemplated by the above question, is the aforesaid Chapter 632, as amended, dealing with domestic mutual fire associations, and such of the risks as agree so described in the above question which may be written by a company organized under said Chapter 632, as amended, can be written by a Florida corporation so organized; but we appear to have no law which would authorize the organization of a mutual company to insure against any of the other risks as contemplated by the above question.

INSURANCE COMMISSIONER

May 24, 1946.—046-227.

SURETY BONDS—ACCEPTANCE

QUESTION: May fidelity and surety bonds written by a mutual company be accepted by the State of Florida, its agencies and political subdivisions, in the same manner as fidelity and surety bonds written by stock companies?

To Honorable J. Edwin Larson, Insurance Commissioner:

This question assumes, of course, that such a mutual company is authorized to execute fidelity and surety bonds, and is duly qualified to engage in such business in Florida.

There are numerous instances in our statutes requiring the giving of a bond to the state, its agencies or political subdivisions. No attempt is here made to take each instance and discuss whether or not a mutual company might execute such a bond required by particular statutes. It is felt that the question can be disposed of by general answers.

In my opinion the above question properly is answered as follows:

(1) A mutual company cannot write such a bond in any instance when the statute indicates that such bond should be written by a stock company. For example, see Section 645.08, Florida Statutes, 1941, relating to the qualifications of a company which may act as surety on a public official's bond.

(2) If such a bond is issued by a mutual company and there is the right of further possible assessment for premium or the right of possible participation in the profits of the company, it is doubtful that the state, its agencies or political subdivisions, may accept the same.

(3) It would appear that in all other instances fidelity and surety bonds written by such a company may be accepted by the State of Florida, its agencies and political subdivisions.

March 29, 1946.—046-118.

TITLE INSURANCE—REGULATION

QUESTION: Are insurers of title to real property covered by and required to comply with the provisions of Chapter 22637, Laws of Florida, Acts of 1945?

To Honorable J. Edwin Larson, Insurance Commissioner:

Said Chapter 22637 is an act regulating the making, filing and use of rates for certain casualty insurance and for fidelity, surety and guaranty bonds. There is exempted from the effects of the act certain types of said insurance coverage, of no moment here.

It would seem, therefore, that if real property title insurance, and those engaged in such business, are under the requirements of the act, such insurance must be some form of casualty insurance not exempted in the act, or the policy evidencing such insurance must be in law either a fidelity, guaranty or surety bond.

If any title insurance company should issue a bond with respect to title of any land involved in a transaction, in my opinion such type of instrument would be comprehended by the act. However, the ordinary and usual form of a title insurance policy is not in the form of a bond, as such term is usually accepted and understood. It is here assumed, and this opinion is conditioned upon such assumption, that the contract issued by such insurers and evidencing such title insurance is bilateral in character and, generally and substantially, indemnifies against loss (up to a stated figure) occasioned by reason of defects in the title of the insured to the estate or interest of the insured in the real estate covered thereby, or by reason of liens or encumbrances, all as described, conditioned or limited in such contract.

The validity of above Chapter 22637 derives from the lawful exercise of the police power of the state. Under the rule of construction applicable to such regulatory measures, it would seem that reasonably the above type of insurance is neither "casualty insurance" nor a form of "fidelity, surety and guaranty bonds," as such quoted terms are used in said law.

In view of the foregoing, it is my opinion that title insurance contracts, as above described, and insurers issuing the same, are not comprehended by the provisions of Chapter 22637, Laws of Florida, Acts of 1945; and, hence, as to such type of insurance, the above question is answered in the negative.

It would not seem unreasonable for you, as insurance commissioner, to request of these insurers all different forms of contracts which they issue in order for you to ascertain whether or not such contracts are

substantially the kind and type of title insurance contracts here designated. I am confident these insurers will readily respond to such request.

December 20, 1946.—046-518.

FULL ANNUAL PREMIUM—TIME FOR PAYMENT

QUESTION: On April 15, 1946, the insurance commissioner promulgated a ruling under authority of Chapter 22621, Laws of Florida, Acts of 1945, relative to fire coverages, and providing, in part, that term policy contracts with annual payment of premiums and annual policy contracts with annual renewal certificates and installment agreement endorsements should be permitted to be written in Florida for periods not in excess of five years; and that "All shall be written at the full annual premium for the first year, and at not less than 80% of the full annual premium for all subsequent annual installments." Do the underscored words in the quoted part of such ruling refer to the annual premium applicable at the time of the issuance of a contract of this nature, as distinguished from the annual premium applicable at the time of the payment of each premium installment?

To Honorable J. Edwin Larson, Insurance Commissioner:

It is apparent that the question is of significance only if there is change in the annual rate during the period covered by the policy.

The insurance commissioner has applied the quoted language of his ruling to the effect that the above underscored words "full annual premium" referred to the annual premium applicable at the time to the issuance of any such contract. Certainly, such an administrative construction and application of his own regulation is entitled to considerable weight.

However, it is quite obvious that the quoted part of such ruling as set forth above is ambiguous as to meaning, and to avoid doubt and confusion, it is recommended that such part of the ruling be clarified to remove the uncertainty of meaning now found therein.

AGENTS

October 10, 1946.—046-429.

LICENSE OF NONRESIDENT—STATE—CUBA

QUESTION: May a resident insurance agent of Cuba be licensed as a nonresident agent of Florida under Section 627.24, Florida Statutes, 1941, or any other law?

To Honorable J. Edwin Larson, Insurance Commissioner:

It is assumed that the agent contemplated by the question is a fire, marine, casualty and/or surety insurance agent.

Section 627.24 provides, in effect, that examination may be waived as to agents and solicitors duly licensed under the laws of any other state, wherein similar qualifications are by the laws of such other state provided, and where such other state accords similar privileges and exemptions to duly licensed agents or solicitors of this state; provided, the applicant otherwise meets and complies with the provisions of our law.

Section 627.37, Florida Statutes, 1941, provides in part, that when by the laws of any other state any tax, fine, penalty, license fee, deposit of money, or security, or other obligation or prohibition is imposed upon resident insurance agents of Florida doing business in such other states,

then so long as such law continues in force the same requirements, obligations and prohibitions shall be imposed upon every insurance agent of such other state doing business in this state.

Whatever the meaning, intent and effect of the above mentioned laws may be, it seems that the above question may be disposed of by an answer to the following question, viz.: Does the term "state" as used in said mentioned sections include a foreign country?

The particular question has never been presented to our supreme court; and I am not able to locate our court's construction of any other law in which the word "state" was used in a sense analogous to its use in these sections. Recourse of the decisions of other states upon the point evidences a diversity of decisions. The controlling feature in each of these decisions appears to have been the nature of the statute being reviewed by the court and the use of the word "state" in such statutes; (See annotations following heading "Foreign State," under "State," Words and Phrases, Vol. 40, pages 13-15). Until and unless our court should determine in appropriate proceedings that the word "state" as used in the above mentioned sections is to be interpreted as including foreign countries, considerable doubt exists that such construction would be correct.

In view of the foregoing, in my opinion the above question properly is answered as follows:

In the absence of a construction of the word "state" as used in these statutes by our supreme court, such doubt exists that a correct interpretation thereof would include within its meaning a foreign country, that it is my opinion such construction should not be indulged in here, and that the term should be taken and construed as including only other states of the United States. Hence, the question should be answered in the negative.

September 19, 1946.—046-398.

LICENSE—RIGHT TO WITHHOLD

QUESTION: Has the insurance commissioner of Florida the authority to withhold or decline to renew a life insurance agent's license requested by the company he represents at the end of the license year under, and as contemplated by, the provisions of Section 627.32, Florida Statutes, 1941, when complaints against such agent which, if true, would warrant suspension or revocation of the license of such agent, have been filed with the insurance commissioner and such facts are being investigated at the time such license renewal is issuable under said provision of law, but no formal charges have been prepared or filed against such agent and no notice setting down such matter for hearing has been given such agent, as provided by Section 627.31, Florida Statutes, 1941?

To Honorable J. Edwin Larson, Insurance Commissioner:

Licenses issued to life insurance agents under the appropriate provisions of Chapter 627, Florida Statutes, 1941, expire annually on the first of October of each year unless prior thereto the same have been revoked or suspended by the insurance commissioner, or the authority of the agent to act for his company is terminated; and in the absence of contrary ruling by the commissioner in a given case, license renewals shall be issued from year to year upon the request of the company which is represented by the agent without further action on the part of the agent, whereupon the license for the preceding year shall continue in effect pending renewal thereof. Section 627.32, Florida Statutes, 1941.

It is understood that at this time complaints have been filed with you with respect to a life insurance agent, that such complaints are

under investigation and are of such nature that if, as a result of your investigation, you find the same to be true to your satisfaction, it will be proper to institute proceedings to suspend or revoke the license of such agent, as provided in Section 627.31, Florida Statutes, 1941. If such proceedings were instituted and notice with respect to hearing thereof were given prior to the date renewal of such agent's license is issuable under the provisions of said Section 627.32, it is likely that it would not be improper to withhold the issuance of renewal license pending the outcome of such proceeding in view of the fact that, under said Section 627.32, the license for the preceding year continues in effect pending renewal thereof. However, it seems apparent that as to this particular case and from the facts thereof which you have related to me apart from the information set forth in your above letter, no formal charges will be filed and date for hearing fixed prior to October 1, 1946. Such being the case, it would seem that renewal license should be issued to this agent as provided by aforesaid Section 627.32.

Hence, in view of the foregoing, and under the circumstances related, in my opinion the better course to pursue is to treat the question as answered in the negative.

May 25, 1946.—046-228.

INSURANCE COMPANY OFFICER—RESIDENT AGENT

QUESTION: May the officer of a fire, marine, casualty or surety insurer authorized to transact business in Florida properly be licensed under the laws of Florida as a resident agent for said insurer?

To Honorable J. Edwin Larson, Insurance Commissioner:

This question requires a construction of Sections 627.07 and 627.08, Florida Statutes, 1941, and also a consideration of Section 625.22, 1943 Supplement to Florida Statutes, 1941, as such latter section is related to or may affect the meaning and intent of said former sections.

On February 1, 1946, in an opinion of this office addressed to you (our No. 046-43), the conclusion was reached that, in view of the apparent intent of the sections of law set forth in the preceding paragraph, the following persons were not eligible to be licensed as resident insurance agents in this state: a person who worked approximately one-half his time as the salaried special agent of an insurer, and an adjuster who adjusted claims exclusively for an insurer on a salaried basis; and that an independent adjuster properly could not be licensed as an insurance solicitor.

It is not apparent from the above question whether the officer therein mentioned is a compensated one. This would seem to be immaterial, since it appears reasonable that a person who is an officer of an insurer could not qualify as an agent for said insurer as one representing such insurer in a capacity "primarily to solicit, negotiate or effect contracts of insurance, surety or indemnity, on a strictly commission basis," as such quoted words are used in said Section 627.08.

A more thorough discussion of the meaning and intent of said Section 627.08 is found in said former opinion No. 046-43.

In view of the foregoing, it is my opinion that the above question properly is answered in the negative.

April 1, 1946.—046-141.

AUTOMOBILE INSURANCE—LICENSE

QUESTION: May a resident insurance agent of Florida who has been issued a license limited to the sale of "automobile insurance" (which quoted term has been accepted, construed and used by the Insurance

Commissioner of Florida to include automobile fire, theft, tornado and collision insurance) also sell automobile public liability and property damage insurance by virtue of said license?

To Honorable J. Edwin Larson, Insurance Commissioner:

The insurance agents' qualification law found in and part of Chapter 627, Florida Statutes, 1941, sets forth the manner in which a person desiring to be licensed as a resident agent of an insurer in Florida may qualify for and be licensed as such. Section 627.03 Florida Statutes, 1941, provides that an applicant for such license, may apply for license authorizing him to engage in various lines of the insurance business, as therein set forth, including "any special line of the general insurance business." It is apparent from the provisions of Sections 627.03 and 627.05, Florida Statutes, 1941, that an applicant for license must evidence, among other things, that by knowledge, experience or instruction (of that character contemplated by these particular laws), he is qualified to be licensed to sell the line of insurance for which he seeks license as an agent; and that the insurance commissioner, in connection with such applicant's examination, must find the applicant so qualified.

You state that "automobile insurance" thus far has been construed by you as used in an agent's license issued by you to mean "fire, theft and comprehensive insurance on automobiles"; and inquiry develops that the term "comprehensive" covers the risks of "tornado" and "collision." If such are the constructions of your department, it is assumed the agent who hitherto was issued a license limited to the business of fire, theft and comprehensive insurance on automobiles, made application only for such license and was examined only in connection with such limited line of insurance. If such application and examination were limited to such line of insurance, it would seem that such an agent has not met the prerequisites found in said Sections 627.03 and 627.05 to being licensed to sell automobile public liability and property damage insurance.

It is here remarked that this question apparently has arisen from the use of the term "automobile insurance" in a limited license of this kind. Such quoted term, without further explanation, reasonably would be construed to include all kinds of insurance usually carried by persons in connection with ownership and use of automobiles. It would seem that this uncertainty with respect to a license issued to an agent to sell "automobile insurance" can be obviated by hereafter issuing a license which clearly designates the specific line of automobile insurance the agent may sell.

In view of the foregoing, in my opinion, the above question properly is answered as follows:

Under the circumstances found in said question and discussed above, it would seem that a resident insurance agent who has been granted a limited license to engage in the business of "automobile insurance," is not by virtue of such license authorized to sell public liability and property damage insurance.

February 1, 1946.—046-43.

LICENSES—ELIGIBILITY

QUESTIONS: (1) Is a person who works approximately one-half his time as special agent of an insurance company on a salaried basis, eligible to be licensed as an insurance agent?

(2) May an independent insurance adjuster properly be licensed as an insurance solicitor?

(3) Is an insurance adjuster who adjusts claims exclusively for an insurance company on a salaried basis, eligible to be licensed as an insurance agent for such insurance company?

To Honorable J. Edwin Larson, Insurance Commissioner:

It is understood that we are here concerned with fire, marine, casualty or surety insurers, their agents and solicitors.

The questions above require a construction of Sections 627.07 and 627.08, Florida Statutes, 1941; and also Section 625.22, 1943 Supplement to Florida Statutes, 1941, as related to such former sections.

Section 627.07 provides that a person employed by a fire, marine, casualty or surety insurer, for supervisory purposes only, may solicit or negotiate contracts of insurance, surety or indemnity, when and only when personally accompanied by an insurance agent duly licensed pursuant to law. It would seem that a salaried special agent of an insurance company is a person employed for supervisory purposes within the meaning of this provision of law.

Section 627.08 provides, in part, that no person employed by a fire, marine, casualty or surety insurer on a salary basis or representing any such insurer in any capacity except primarily to solicit, negotiate or effect contracts of insurance, surety or indemnity on a strictly commission basis, shall be deemed or held to be an insurance agent or solicitor; that nothing in said section should prohibit the granting of licenses to general agents of casualty and surety companies working on a strictly commission basis.

Section 625.22 provides that all mutual insurance companies, other than life, authorized to transact business in Florida, should issue policies only through and have them countersigned by resident agents; that, as stated in the law, the company shall certify to the insurance commissioner, whether its agents will be paid on a **commission** or **salary** basis; that all agents of any such company shall be compensated in the same manner on a commission or salary basis, but not by both commission and salary; that such agents shall comply with all other provisions of law relating to the qualifications and licensing of agents.

It is noted that the title of Section 627.08 is "Certain persons exempt from the requirements of this chapter." Nevertheless, reasonably it would appear that the intent of said section is to **prohibit** the licensing of certain persons as insurance agents or solicitors, rather than to **exempt** such persons from the provisions of our laws relating to agents and solicitors.

At a time when no distinction was made by our laws between method of compensation of resident agents for mutual companies and stock companies, our supreme court in *State vs. Knott* (Fla.) 184 So. 752, sustained the requirements of Section 627.08 against attack by a representative of certain mutual companies compensated on a salary basis. That case is of little assistance here.

In *Hartford, etc., Co. vs. Harrison*, 301 U. S. 459, 81 L. ed. 1223, the Supreme Court of the United States held that a provision of the Georgia law which precluded the licensing of a salaried employee of a stock company as a "resident agent" of such company, but which included any agents of mutual insurance companies, however compensated, denied to stock companies and their agents equal protection of the laws.

The questions here do not present the issue which was before the court in the *Hartford* case; yet if Section 625.22 is construed as removing resident agents of mutual companies entirely from the intent and effect of Section 627.08, certainly we collide with the *Hartford* case. We are presented not only with this question, but others. These questions can be settled definitely only by the courts. In the absence of such interpretations, the best that can be done is to attempt to construe the laws here involved so that they shall be given a constitutional application and reflect legislative intent.

A consideration of Sections 625.22, 627.07 and 627.08 leads to the reasonable conclusion that it was the legislative intent to express a rule of public policy that no person who, in connection with regular employment or business, performs services for and is compensated by insurers on a salaried or other basis unrelated to commissions or salaries payable to resident insurance agents for stock and mutual companies for the sale of contracts of insurance (in the manner and as contemplated by Sections 625.22 and 627.08) is qualified to be licensed as an insurance agent or solicitor in this state.

Accepting such rule of construction, it appears that the above questions properly are answered as follows:

Each of the three questions above is answered in the negative; that is to say, neither of the persons described in questions (1) and (3) is eligible to be licensed as a resident insurance agent under our laws, and the person described in question (2) is not eligible to be licensed as an insurance solicitor under our laws.

December 11, 1946.—046-508.

CANCELLATION OF LICENSE—FORM OF CHARGES

QUESTION: Are the notice of hearing and charges, as prepared, to determine whether or not the insurance agent's license of Virgil D. Wright, Miami, Florida, should be cancelled after hearing, under Section 627.31, Florida Statutes, 1941, sufficient as to form?

To Honorable J. Edwin Larson, Insurance Commissioner:

Reference is made to our letters to you of September 17, 1946, and November 4, 1946 (our file No. 046-444). In the latter communication I set forth my conclusions, from facts made available to me, of possible charges which apparently might be preferred against this agent. The charges found here include those mentioned in my former letters and others, and this opinion is based solely upon the sufficiency of the notice and charges as prepared and is not concerned with availability of evidence to support the charges. In my letter of November 4, 1946, I referred to the case of *State v. Knott* (Fla.) 166 So. 835, and to the "positive proof of proper charges" required in a proceeding of this kind to warrant cancellation of an agent's license (see headnote 3 of that case and indicated part of opinion). In the copy of letter from the above law firm to you of November 25, 1946, which accompanied your letter, a good reason is given why specific policies by dates and numbers are not set forth in the several charges. While uncertainty still exists in my mind as to whether or not these policies should be particularly described in the charges, persuasive law is referred to which would seem to indicate that such particularity may not be required.

In the case of *Jenkins v. Curry, City Manager, et al.* (Fla.), 18 So. 2d. 521, which had to do with proceedings to dismiss a police officer for drunkenness while on duty, it was held that in such a proceeding it was unnecessary to observe formalities in introduction of testimony in a criminal prosecution or technical common rules common to courts of justice. This rule is elaborated on in the part of the opinion related to headnote 4 thereof. I am of the impression that a hearing under Section 627.31, Florida Statutes, 1941, is a hearing similar in nature to that found in this case.

Attention is further directed to the last paragraph of Section 627.14, Florida Statutes, 1941 (dealing with proceedings against insurance agents other than life agents), which provides that the charges or complaint against any agent or solicitor may be informally alleged and need not be in such language as is necessary to charge a crime or offense on an indictment or information. I construe that paragraph to state the general

rule referred to in the above case of *Jenkins v. Curry*, and furthermore, it would seem that any rule of this nature which is applicable to hearings in connection with the conduct of insurance agents other than life agents reasonably would also apply to proceedings under Section 627.31, even though that rule of procedure is not specifically set forth in the latter section.

On the first page of these papers which you have submitted to me and constituting a part of the proposed notice to Wright, reference is made to the proceedings as being brought under Section 621.14, Florida Statutes, 1941. It would seem that this should be corrected to let the notice recite that the proceedings that are being brought under Section 627.31, since proceedings under the former section are not applicable to life agents.

In view of the foregoing, in my opinion the above question properly is answered as follows:

(1) On page 1 of the notice and charges, delete "and pursuant to Chapter 20263 Laws of Florida 1941, Section 627.14 Florida Statutes, 1941," and substitute therefor "Section 627.31, Florida Statutes, 1941."

(2) In the absence of a court decision directly on the point and as a matter of caution, it is recommended that the policies involved in the various charges described with particularity; however, it is my further judgment that if such were not done and the point were raised, the weight of reason is that such is not required.

September 19, 1945.—045-292.

BRITISH INSURANCE UNDERWRITERS—MARINE

QUESTIONS: It appears that a group of British insurance underwriters is engaging in the insurance business in Florida, such business being confined to marine insurance and being written and issued for said group by its agents in Florida.

1. Is such group of underwriters subject to state insurance regulatory and tax laws?

2. Are such agents subject to the laws of Florida respecting the qualification and licensing of insurance agents?

To Honorable J. Edwin Larson, Insurance Commissioner:

It appears from the report of the agent of the insurance department of Florida that a group of British underwriters is issuing, through its agents in Tampa, Florida, ocean marine insurance. This group of underwriters has been issued no permit to do business in Florida. The agents representing the group have not qualified and not been licensed as required by the Laws of Florida.

An examination of your request for opinion and the file attached thereto indicates that the conclusions you have reached with respect to this matter are in accord with mine, which are set forth below.

It appears that the above questions properly are answered in the numbered order stated, as follows:

1. This group of British insurance underwriters is an insurer within the meaning of the insurance laws of Florida. As an insurer it is subject to Florida's insurance regulatory and tax laws in like manner as a similar foreign insurer resident of one of our other states is subject to such laws.

2. The agents representing this group are subject to Florida's laws relative to the qualification and licensing of insurance agents representing

an insurer engaged in writing the type of insurance issued by this group.

May 22, 1945.—045-124.

CORPORATION—APPOINTMENT AS AGENT OF TITLE INSURER

QUESTIONS: 1. If Senate Bill No. 495 (House Bill No. 738), becomes a law, would a designated corporate agent of a title insurer, as provided by Section 12 of said bill, be limited in his activities as such an insurance agent to the field of title insurance?

2. If such bill becomes a law, would the fact that by Section 12 of the bill an agent of a title insurer may be a corporation, interfere with or affect the validity of the general insurance law of the state relating to qualifications, appointment and licensing of insurance agents, and which contemplates that agents of all other insurers must be natural persons?

To Honorable J. Edwin Larson, Insurance Commissioner:

The pertinent part of Section 12 of the above bill is as follows:

"Section 12. Every corporation holding a permit hereunder may designate, by an instrument or instruments signed in its name by its President or a Vice President and sealed with its corporate seal, attested by its secretary or an assistant secretary, to be filed with the State Treasurer, good until revoked in a writing, likewise filed with the State Treasurer, one or more persons, firms or corporations, of this state, as its agent or agents to receive applications for and to countersign and deliver its title insurance policies, title insurance binders, title certificates and title guaranties, but no such designation shall be taken to constitute any designated agent as an agent of such corporation for any purpose whatsoever other than the receiving of applications for and the countersigning and delivery of title insurance policies, binders and certificates and such additional powers if any, as may be expressly set forth in such instrument, all other laws and parts of laws to the contrary notwithstanding."

Chapter 627, Florida Statutes, 1941, relating to insurance agents contemplates that as the law now exists all insurance agents shall be natural persons.

Above Senate Bill 495 (House Bill 738) appears to be a comprehensive law regulating title insurers in this state and it seems that a reasonable construction of the whole act would indicate that each part thereof relates exclusively to title insurance as distinguished from any other type of insurance.

In my opinion, the above questions are properly answered as follows:

1. While I feel that the agents provided for in Section 12 of the above proposed act would be limited in their activities as such agents to title insurance as distinguished from other types of insurance, as a matter of caution I suggest that there be added at the end of Section 12 the following provision:

"The provisions of this section are to be taken and construed as applying exclusively to title insurance and to no other kind of insurance issued, written or delivered in this state."

2. Should this proposed act become a law, with the suggested amendment, I do not see how it could in any way affect the law as it now exists with respect to the qualifications, appointment and licensing of insurance agents for all other types of insurance.

February 16, 1946.—046-55.

ADJUSTER—ELIGIBILITY AS SOLICITOR

QUESTION: Is a salaried insurance adjuster for an insurance company eligible to be licensed as a solicitor for a Florida resident agent of said company?

To Honorable J. Edwin Larson, Insurance Commissioner:

For the reasons set forth in my letter to you of February-1, 1946, relating to the construction of Sections 627.07 and 627.08, Florida Statutes 1941, and concerning persons not eligible to be licensed as insurance agents and solicitors, in my opinion the above question properly is answered in the negative.

October 11, 1945.—045-319.

INSURANCE COMMISSIONS—DIVISION

QUESTION: "A," "B" and "C," all residents of Florida, form a corporation which enters into a general agency contract with the XYZ Insurance Company, such company writing fire and allied lines of insurance, to represent such company in a certain section of Florida. "A" and "B" both qualify and are duly licensed as insurance agents under the Laws of Florida and are the designated agents of said XYZ Company. All commissions earned by "A" and "B" are turned into the corporation and, in time, the part thereof not required for expense of the corporation is distributed to such three stockholders as dividends on stock owned by them. Can "C," who owns the controlling stock in the corporation and who is not licensed or operating as an insurance agent, accept such dividends without violating a Florida Law?

To Honorable J. Edwin Larson, Insurance Commissioner:

While no point is here made of it, grave doubt exists that the commissions of a Florida insurance agent could, under any circumstances, be considered the earnings of a corporation.

Only individuals may qualify and be licensed as insurance agents under Florida law.

No insurance agent of this state shall divide or offer to divide, directly or indirectly, the commissions due to or received by him, with any other agent, solicitor or broker, or other person, except as expressly permitted by law. Section 627.19, Florida Statutes, 1941. An insurance agent may divide commissions with any other licensed insurance agent or solicitor who resides in this state and writes the same class of business, and with any nonresident agent duly authorized and licensed in his home state, who shall have procured the business and sent or caused to be sent the policy, bond or other contract to said Florida agent for signature as required by law. Section 627.18, Florida Statutes, 1941.

Under the above factual situation, "C" is not such an agent, solicitor, broker or other person entitled to share in any division of insurance commissions earned by "A" and "B."

In view of the foregoing, it appears that the above question properly is answered as follows:

It would seem that the plan set forth in the above statement any question would result in a division of insurance commissions by "A" and "B" with "C"; and under the factual situation presented, this would be in violation of our said laws relating to division of insurance commissions.

October 12, 1945.—045-323.

INSURANCE COMMISSIONS—DIVISION

QUESTION: "A," who is a qualified and licensed insurance agent under the Laws of Florida, desires to organize a corporation, the income of the same to derive from commissions earned by such agent from the sale of fire and casualty insurance. He further desires to dispose of certain of the shares of stock of said corporation to persons who purchase insurance from him, sale or other disposition of such stock to be on some basis not disclosed by the information at hand. Would such a plan conflict with any Florida law relative to the business of insurance?

To Honorable J. Edwin Larson, Insurance Commissioner:

Only an individual may qualify and be licensed as an insurance agent under the laws of Florida. For this reason, grave question arises with respect to any proposed arrangement which would contemplate that the commissions of such an agent should be treated and used as corporate earnings. Furthermore, while the facts set forth above are not particular enough to indicate just how closely related it is intended the sale of insurance and the sale of the stock shall be, there is the chance that the arrangement would conflict with the provisions of Sections 625.19 and 625.20, Florida Statutes, 1941, concerning prohibited "inducements to insurance or in connection therewith." However, because of the objection to the plan set forth below, the above two features are not here further discussed.

In my opinion the above plan is not permissible because it reasonably contemplates a division of commissions received by a Florida insurance agent with persons not authorized to share in such division, as prescribed by Sections 627.18 and 627.19, Florida Statutes, 1941.

April 8, 1946.—046-131.

INSURANCE SOLICITOR—DOMICILE

QUESTION: "A" is a licensed resident insurance agent of Florida at West Palm Beach, and he is also a stockholder and an officer of an incorporated insurance agency of that place, here designated as "A, Inc.," with its principal office located in said city. This corporation owns more than fifty per cent of the stock in, and exercises complete supervision over, an incorporated insurance and mortgage agency, here designated as "B, Inc.," which has its principal office located at Ft. Lauderdale. Under our laws, is it proper for the insurance commissioner to issue license to "C," an individual, to work out of the offices of "B, Inc.," in Ft. Lauderdale as the insurance solicitor of "A, Inc.," upon application for such license filed by the latter corporation?

To Honorable J. Edwin Larson, Insurance Commissioner:

An insurance solicitor must be employed by a duly licensed insurance agent of Florida to solicit contracts of insurance, indemnity or suretyship on behalf of such agent. Section 627.08, Florida Statutes, 1941. It is, of course, recognized that a resident insurance agent under our laws must be an individual. One who seeks a license as an insurance solicitor must make application therefor. Section 627.03, Florida Statutes, 1941. Recognizing these requirements, it is apparent from the factual situation found in the above question that a negative answer is required.

From information furnished, it appears that this particular resident agent has been engaged in the insurance business for some time, and evidently is familiar with the insurance laws of Florida respecting the licensing of agents and solicitors. For this reason, it is here recognized that the application of "A, Inc." for the issuance of a solicitor's license to "C," as reflected in the above question, might have been oversight, the

intention being that "C" should make application for license as solicitor for "A," as a resident insurance agent. Even if such were the intention in connection with this application, from the factual situation presented, it does not appear that properly "C" could be licensed as "A's" solicitor, for the reasons set forth below.

Section 627.04, Florida Statutes, 1941, provides, among other things, that no license shall be issued any solicitor unless it affirmatively appears in the application that his "permanent place of business" is and will be, during the term of his license, "in the office or place of business of the insurance agent by whom he is employed." This section of the law has the proviso that a license may be issued in the discretion of the insurance commissioner to a solicitor to act as such in a city, village or town other than that in which the insurance agent by whom he is employed is located when it affirmatively appears from the application that such solicitor has his permanent place of business in such city, village or town. I have been informed that it is the policy of the insurance commissioner not to issue a license under this proviso to any solicitor in any city, village or town when there is located in such place a licensed resident agent, or agents.

Even though the factual situation expressed in said question is modified to the extent set forth in the preceding paragraphs, there is yet no indication therein that it is intended that "A," as a resident insurance agent of Florida, shall have an "office or place of business" in Ft. Lauderdale which could be the "permanent place of business" of said solicitor, all as contemplated and required by said Section 627.04. The mere fact that "A" is a stockholder in and an officer of "A, Inc.," and that "A, Inc.," owns more than fifty per cent of the stock in and completely supervises "B, Inc.," does not necessarily mean that the office of "B, Inc.," in Ft. Lauderdale would be the "office or place of business" of "A" within the meaning of such section.

In view of the foregoing, in my opinion the above question properly is answered as follows:

(1) It would not be proper to issue a license to "C" as an insurance solicitor for "A, Inc."

(2) Even though proper application were filed by "C" for license as an insurance solicitor for "A," granting that otherwise "C" may be found to possess all other qualifications prerequisite to act as such a solicitor, since the factual situation presented does not evidence that "A" shall have "an office or place of business" in Ft. Lauderdale, as contemplated in and required by said Section 627.04, it would not be proper to license "C" as such solicitor.

RECIPROCAL

November 13, 1946.—046-479.

NONRESIDENT LICENSE—QUALIFICATION OF AGENT

QUESTION: Is it lawful for the insurance department to issue a reciprocal agent's license to a resident of another state to solicit business actively in this state for a reciprocal exchange?

To Honorable J. Edwin Larson, Insurance Commissioner:

It is my understanding that for quite a number of years your department has issued licenses to a nonresident for the purposes contemplated by this question. I imagine that you have observed such a course of procedure because of the following: the provisions of Section 628.14, Florida Statutes, 1941, to the effect that except as provided in Chapter 628, Florida Statutes, 1941, no law of Florida relating to insurance shall apply to the exchange of reciprocal contracts unless they are specifically

mentioned; that no provision in said Chapter 628 requires that agents for reciprocal insurance must comply with the agent's qualification laws; and that no specific provisions in such latter laws make them applicable to agents for reciprocal insurers.

As long ago as October 23, 1925, then Attorney General Rivers H. Buford held (Biennial Report of Attorney General, 1925-1926, page 208), that Chapter 10150, Acts of 1925 (relating to premium receipts taxes assessed against insurers), and Chapter 10153, Acts of 1925 (relating to the qualifications of insurance agents), did not apply to reciprocal insurers and their agents. While by Chapter 22671, Laws of Florida, Acts of 1945, reciprocal insurers were specifically (with other insurers) required to pay the license and premium receipts taxes therein prescribed, there appears to have been no change in the laws relating to qualifications of agents specifically including the agents of reciprocal insurance.

It would appear that "no law of this state relating to insurance" as such words are used in said Section 628.14, would include our laws relating to insurance agents. Hence, whatever requirements may be attached to the licensing of the agent for a reciprocal insurer must be found in said Chapter 628. It is here remarked that while said Chapter 628 was original Chapter 6846, Laws of Florida, Acts of 1915, as said Chapter 628 it was reenacted and readopted by Section 1 of Chapter 22858, Laws of Florida, Acts of 1945, effective June 11, 1945.

In view of the foregoing, in my opinion the above question properly is answered in the affirmative.

December 7, 1945.—045-378.

ATTORNEYS—REPEAL OF CERTAIN SECTIONS

QUESTION: To what extent does the 1945 gross premium receipts tax law (Chapter 22671, Laws of Florida, Acts of 1945) repeal or amend all or any of the sections of our statutes relating to reciprocal or inter-insurance (Chapter 628, Florida Statutes, 1941)?

To Honorable J. Edwin Larson, Insurance Commissioner:

Section 628.12, Florida Statutes, 1941, headed "License tax and tax on gross receipts," requires attorneys doing business under the provisions of said Chapter 628, "in lieu of all other taxes and fees of whatever character in this state" to pay to the insurance commissioner of Florida: (1) ten dollars with the filing of each annual report; (2) a tax of two per cent of the gross deposits received from Florida subscribers during the preceding calendar year, reduced by all amounts returned to such subscribers or credited to their accounts other than from losses; (3) a license tax of six dollars for each agent and ten dollars for each adjuster.

The above Chapter 22671, Laws of Florida, Acts of 1945, provides for license taxes and premium receipts taxes to be paid by insurers in the amounts and at the times therein required. Such taxes must be paid as a condition precedent to an insurer doing business in Florida. Included in the term "insurers" as used in said act are attorneys doing business under the provisions of said Chapter 628. Section 1 (3) of such Chapter 22671 provides for the tax returns to be used with respect to such premium receipt tax. Section 2 of said Chapter 22671 provides for the revocation of certificate of authority of an insurer who fails to pay such premium receipts tax, and in such event, making it unlawful for such insurer to transact business in this state unless such insurer shall be granted a new certificate as therein provided. Section 4 of said chapter repeals Sections 205.43 and 205.44, Florida Statutes, 1941 (the general license and premium tax laws for insurers thereof obtaining) and "all other laws and parts of laws in conflict herewith," except certain named sections not of moment

here. It is apparent that said Chapter 22671 provides for a license tax for the insurers engaged in the business of reciprocal or interinsurance not required under said Section 628.12, and that said chapter provides a premium receipts tax for such insurers different from such tax required by said section.

Section 628.07 requires the filing of an annual report to the insurance commissioner. It does not appear that the requirements of said section are in any manner affected by the provisions of said Chapter 22671.

Section 628.11, Florida Statutes, 1941, provides, among other things, for the revocation of a certificate of authority "in case of breach of any of the conditions imposed by this chapter after reasonable notice" has been given as required therein.

In view of the foregoing, it appears the above question properly is answered as follows:

The several sections of Chapter 628, Florida Statutes, 1941, are not repealed or amended, in whole or in part, by Chapter 22671, Laws of Florida, Acts of 1945, except Sections 628.11 and 628.12 and as to them, only to the extent noted:

(1) The taxes payable by an attorney doing business under said Chapter 628 as provided by said Section 628.12 read in conjunction with the requirements of said Chapter 22671, are detailed as follows: Ten dollars payable at the time of the filing of the annual report, and the license tax of six dollars for agents and ten dollars for adjusters, all as required by said Section 628.12; and in addition thereto the license and premium receipts taxes required to be paid by insurers under said Chapter 22671, such premium receipts taxes to be accompanied by return required by Section 1 (3) of said Chapter 22671. To the extent thus indicated, said Chapter 22671 in effect amends said Section 628.12.

(2) Section 628.11 in effect includes among other causes for revocation of a certificate of authority failure to pay the premium receipts tax hitherto required by said Section 628.12 and now required by said Chapter 22671. Revocation proceedings provided by such Section 628.11 require prior notice to the insurer. It would seem that under Section 2 of said Chapter 22671, no notice is prescribed in the event the state treasurer, as insurance commissioner, revokes such a certificate in the event an insurer fails to pay the premium receipts tax required by said law. To such extent, said Section 628.11 is in effect amended by said Chapter 22671.

(3) The reference in any of the sections comprising said Chapter 628 to "this chapter" shall be construed to include the changes in the provisions of said chapter effected by said Chapter 22671 as above noted.

April 24, 1946.—046-171.

RECIPROCAL CONTRACTS—FILING OF RATES

QUESTION: Are persons, firms and corporations engaged in the exchange of reciprocal or interinsurance contracts required to comply with the provisions of Chapter 22621, Laws of Florida, Acts of 1945?

To Honorable J. Edwin Larson, Insurance Commissioner:

Chapter 22621, Laws of Florida, Acts of 1945, is an act providing for the making and filing of rates for fire and other kinds of insurance which fire insurance companies are authorized to write, with certain minor exceptions noted therein. By Section 1 (f) of said Chapter 22621, an "insurer," as used in said act is defined as "any person or persons, corporation, association, partnership or company authorized by the laws of this state to transact the business of insurers in this state. While indi-

viduals, partnerships and corporations engaged in the exchange of reciprocal or interinsurance contracts with each other, clearly fall within said definition, such insurers are not by name mentioned in said Chapter 22621.

It is pertinent to remark that Chapter 22637, Laws of Florida, Acts of 1945, provided for the making, filing and use of rates for casualty insurance and for fidelity, guaranty and surety bonds. Reciprocal insurers are specifically mentioned by name and included under the provisions of this chapter.

Chapter 628, Florida Statutes, 1941, deals with reciprocal or interinsurance. Section 628.14 thereof provides as follows:

"Except as provided in this chapter no law of this state relating to insurance shall apply to the exchange of such indemnity contracts unless they are specifically mentioned."

Since the provision found in said Section 628.14 cannot be construed as a restriction on the legislative function thereafter exercised, it would seem clear that it is to be given no greater importance than its bearing upon the question of legislative intent in relation to laws subsequently enacted and which, but for such provision, obviously would include reciprocals. In other words, the effect of said Section 628.14 is that its provisions constitute but one factor in arriving at legislative intent; and when the question of the coverage of reciprocals in any particular law is presented, where there exist other and opposing circumstances which fall within recognized judicial rules for ascertaining legislative intent, the provisions of said Section 628.14 must overcome or yield to such opposing factors.

It would seem that such other and opposing factors are presented by the provisions of said Chapter 22621 and the circumstances of its enactment to which the aforesaid effects of the above Section 628.14 must yield.

The immediate relationship of the case of U. S. vs. South Eastern Underwriters Association, et al., 322 U. S. 533, and the law of the Congress popularly known as the McCarran Act, to the enactment of both the insurance rate bills here discussed, is recognized. Whether such case and such law demanded regulation of the rates employed by all types of insurers in the field of insurance covered is immaterial, since it appears it was the legislative intent by above mentioned Chapters 22621 and 22637 to provide regulation of rates to be used with respect to all kinds of insurance contracts, with minor exceptions and other than life insurance, regardless of the type of insurer issuing such contracts. In view of such apparent legislative policy, the specific mention of reciprocals in the casualty rate bill (said Chapter 22637) is persuasive that there was no legislative intent to exclude such insurers from the effects of said Chapter 22621. Certain kinds of insurance are specifically excepted from the effects of Chapter 22621 (see Section 2 thereof), and certain insurers are excepted from the effects of said chapter (see Section 25 thereof), but the act provides no exception of those engaged in the exchange of reciprocal or interinsurance contracts or of such contracts.

In view of the foregoing, it is my opinion that the above question is properly answered in the affirmative, that is to say, that persons, firms and corporations engaged in the exchange of reciprocal or interinsurance contracts are insurers who are included in and are required to observe and comply with the provisions of Chapter 22621, Laws of Florida, Acts of 1945.

July 29, 1946.—046-323.

FOREIGN INSURERS—FLORIDA AGENTS

QUESTION: A person duly licensed as an insurance agent in Florida, representing certain companies admitted to do business in this state, main-

tains an office in Miami, Florida, and also as an authorized insurance broker in the State of New York, maintains an office as such in the City of New York, spending part of his time in Florida and part in New York. The agent, through his Miami office, has placed insurance, issued and/or underwritten by British corporate insurers not authorized to engage in business in Florida, whom the agent represents, with Florida residents, covering shipments of such residents from foreign ports to Florida ports, consigned to such residents, coverage limited to the shipments while water borne only. No policies or binders evidencing such contracts of insurance are executed in this country; but it is here assumed such contracts are delivered by said agent to such Florida insureds. The agent collects the premiums from such insureds, and in event of loss, delivers proceeds to the insureds. (1) Under such circumstances, are these British insurers engaging in the insurance business in Florida in conflict with the laws of this state regulating insurers? (2) In acting as agent for these insurers, is this agent offending the laws of Florida pertaining to the regulation of insurance agents?

To Honorable J. Edwin Larson, Insurance Commissioner:

On September 19, 1945, I delivered to you an opinion (our opinion No. 045-292) that an insurance agent in Tampa in placing insurance for a group of British corporate insurers, not admitted to engage in the insurance business in Florida, offended the laws of Florida regulating the activities of insurers in Florida and regulating the agents of insurers in Florida. This agent attempts to distinguish the nature of his activities from those found in the Tampa case, pointing out that in the way of shipments, only import and not export shipments are covered. If export shipments were covered, obviously these British insurers would be engaging in the insurance business in Florida, and their agent would be engaging in acts prohibited by the laws of Florida in acting for them. And it would seem that under the factual situation found above, that these insurers, acting through their agent in Florida, are engaged in the insurance business in this state.

It is recognized that statutory provisions regulating foreign insurers cannot be applied to affect the extra-territorial activities of such insurers. *Hussey Tie Co. vs. Knickerbocker Ins. Co.*, 20 F. 2d. 892, cert. denied 275 U. S. 569; *Allgeyer vs. Louisiana*, 165 U. S. 578. It is further recognized that in determining whether or not an insurer is engaged in the insurance business in a state, all factors bearing upon the question must be considered. *Hoopston Canning Co. vs. Cullen*, 318 U. S. 313. It is noted, however, that a foreign insurer may be doing business in a state if it solicits insurance or collects assessments from resident policyholders (*McNeeley vs. Fidelity Mut. Ben. Ass'n.*, 178 S. E. 374), or if it maintains an agency in the state, even though it does not enter into contracts with residents of the state (*State ex rel Read vs. Mid-West Mutual Benefit Co.*, 181 Okla. 338, 73 P. 2d. 1138), or may not insure property situated therein (*North American Ins. Co. vs. Yates*, 214 Ill. 272, 73 N. E. 423).

Section 627.22, Florida Statutes, 1941, provides that "it shall be unlawful for any agent or solicitor, directly or indirectly, to collect any insurance premium, or to solicit, negotiate, effect, procure, receive or forward any contract of insurance, or renewal thereof, for any insurance company not lawfully authorized to transact business in this state, or in any manner to aid or assist in any such transaction." Furthermore, it appears that the described activities of this agent brings him within the definition of "agent" or "insurance agent" as such terms are defined in Section 625.01(1) (a) (b) and (c), and as such terms are used in the pertinent laws of Florida regulating insurance agents.

In view of the foregoing, in my opinion the above questions properly are answered as follows:

(1) Under the factual situation set forth above, it would seem that these British insurers, acting through their Florida agent as aforesaid, are engaging in the business of insurance in Florida in conflict with regulatory laws of this state pertaining to insurers.

(2) The activities of such agent as set forth above, representing insurers not admitted to do business in Florida, would seem to be prohibited by the provisions of said Section 627.22, Florida Statutes, 1941, and to offend other laws related to the regulation of insurance agents in this state.

August 26, 1946.—046-358.

CORPORATIONS—INTER-INDEMNITY AGREEMENT

QUESTION: Two corporations (not engaged in the insurance business), the majority of stock of each being owned by the same individual, desire to enter into an agreement setting up an insurance fund for the benefit of both corporations. Each corporation operates a number of different stores, and in the event of loss, each would pay into the fund in proportion to the amount of insurance carried. Would such an agreement constitute reciprocal or interinsurance as contemplated by Chapter 628, Florida Statutes, 1941, as amended?

To Honorable J. Edwin Larson, Insurance Commissioner:

The ownership of a majority of the stock of both said corporations by one person would seem to be of no moment here; each corporation is a distinct legal entity.

An "insurer," as used in our insurance laws, is any person, firm, partnership, association, corporation or other organization or group "who issue or enter into contracts or policies of insurance, indemnity or surety." Section 628.01 (6), Florida Statutes, 1941. Individuals, partnerships and corporations, designated subscribers, may exchange reciprocal or interinsurance contracts with each other, under the circumstances and as provided by Chapter 628, Florida Statutes, 1941, as amended. Such contracts may be executed by an attorney, agent or other representative, designated attorney, duly authorized and acting for such subscribers. Section 628.02, Florida Statutes, 1941.

"Reciprocal insurance" or, as sometimes called, "interinsurance" or "interindemnity," is a kind of insurance characterized by the following: (1) those engaged in a similar line of business agree to indemnify each other against designated losses by a mutual exchange of insurance contracts; (2) such contracts are usually exchanged through an attorney in fact, common to all, appointed for that purpose by each underwriter; (3) under such contracts each member becomes both an insurer and an insured, with several liability only. For examples of such agreements see *Lee Blackmore vs. Lewelling*, 281 F. 952; *John L. Walker Co. vs. National Underwriters Co.*, 3 F. 2d 102; *U R. Roach and Co. vs. Harding*, 348 Ill. 454, 181 N. E. 331. The definitions of reciprocal or interinsurance found in certain of the cases mention, without qualifying words, that such contracts are effected through an attorney in fact common to all members. *E. G. Wyson vs. Automobile Underwriters*, 204 Ind. 492, 181 N. E. 783; *Long vs. Sakleson*, 328 P. 261, 195 A. 416. It is not felt that the presence or absence of such an attorney is determinative of the nature of this insurance, but that an agent common to all is a necessary incident to the conduct of such an enterprise when there are numerous subscribers. In the instant case, we have two corporations only. If fifty corporations, widely scattered, desired to enter into a like agreement, the ordinary demands of such an undertaking would require some sort of central control and management.

In the absence of statutory provisions otherwise controlling, the liability of subscribers to a reciprocal insurance association or exchange is fixed by the contract.

In view of the foregoing, in my opinion the above question properly is answered as follows:

(1) The agreement contemplated by the question would seem to be a contract of insurance or indemnity within the meaning of Section 625.01 (6). If these are foreign corporations, their right to execute such a contract would depend upon the law of their domicile and their charter powers. If they are domestic corporations organized under Chapter 612, Florida Statutes, 1941, grave doubt exists that execution of such an agreement would fall within their powers, since insurance and surety companies (other than limited surety companies under Chapter 649, Florida Statutes, 1941) must be incorporated under Chapter 611, Florida Statutes, 1941.

(2) The simplicity in numbers here involved would permit simplicity of arrangements in effecting the proposed interindemnity agreements. However, it would seem that such an agreement would constitute a contract falling within the definition of "reciprocal insurance," the conduct of which type of insurance is governed by the provisions of said Chapter 628, as amended. It is remarked that under Section 628.09, Florida Statutes, 1941, corporations are granted the power to exchange insurance contracts of the kind and character provided in said Chapter 628.

REGULATION OF RATES

November 13, 1946.—046-480.

APPROVAL OF COMMISSIONER—GRACE PERIOD

QUESTION: Chapter 630, 1945 Supplement to Florida Statutes, 1941, is the law pertaining to regulation of rates for casualty insurance, fidelity, guaranty and surety bonds. Section 630.03 (3) thereof provides that any filing made pursuant to such section shall be approved by the commissioner unless he finds that such filing does not meet the requirements of said law; that as soon as reasonably possible after the filing has been made the commissioner shall in writing approve or disapprove the same; provided that any filing shall be deemed approved unless disapproved within thirty days. After such a filing is made and receipt thereof acknowledged by the commissioner without approving or disapproving the same during the 30-day period, is it permissible for the insurer making such filing to use the rates provided therein during the 30-day period?

To Honorable J. Edwin Larson, Insurance Commissioner:

It would seem that an answer to such question requires also a consideration of Section 630.03 (4), 1945 Supplement to Florida Statutes, 1941, as amended, which provides that any such filing with respect to a fidelity, surety or guaranty bond shall be deemed approved from the date of filing to the date of such formal approval or disapproval.

In my opinion the above question properly is answered as follows:

(1) With respect to filings in connection with rates for casualty insurance (as distinguished from fidelity, surety or guaranty bonds), such rates provided by such filings become effective thirty days after they are filed with the insurance commissioner, provided he has not approved or disapproved them before that time has run.

(2) Filings made with respect to rates for fidelity, surety or guaranty bonds become effective on the date they are filed and continue so unless thereafter they are disapproved by the insurance commissioner.

March 1, 1946.—046-107.

POLICIES AND CONTRACTS—EFFECTIVE DATES

QUESTIONS: 1. Under the provisions of Chapter 22637, Laws of Florida, Acts of 1945, what procedure is to be followed with respect to rates on policies and contracts covered by the regulatory features of Chapter 22637, Acts of 1945, effective prior to April 1, 1946?

2. Under the provisions of said Chapter 22637, what procedure is to be followed with respect to rates on said policies and contracts effective on or after April 1, 1946, but written and delivered prior to such date?

To Honorable J. Edwin Larson, Insurance Commissioner:

Section (3), paragraph (h), Chapter 22637, is as follows:

"Beginning ninety days after the effective date of this act no insurer shall make or issue a contract or policy except in accordance with filings which have been approved for said insurer as provided in this act."

"Beginning ninety days after the effective date of this act," by applying the recognized rule for the computation of time applicable to such wording, fixes April 1, 1946, as the first day the filing required by the act become effective.

It appears that the above questions are properly answered in their numbered order as follows:

1. Contracts and policies, of the nature contemplated by said Chapter 22637, effective prior to April 1, 1946, shall be rated in accordance with the procedures in effect prior to the filing required by the act to be used on and after April 1, 1946.

2. Contracts and policies of an insurer, of the nature contemplated by said Chapter 22637, effective on or after April 1, 1946, even though delivered prior to April 1, 1946, shall be written in accordance with the filings approved for such insurer and effective on and after April 1, 1946, as provided in and required by said act.

June 28, 1946.—046-280.

EXCESS INSURANCE—DEFINITION

QUESTION: Are insurers engaged in the business of insurance as contemplated by Chapter 22637, Laws of Florida, Acts of 1945 (Chapter 630, 1945 Supplement to Florida Statutes 1941), required to comply with the provisions of said chapter with respect to excess insurance written by them?

To Honorable J. Edwin Larson, Insurance Commissioner:

Said Chapter 22637 provides for the regulation of rates for casualty insurance and fidelity, guaranty and surety bonds. The business of "reinsurance" is excepted from the operation and effect of said law. Section 1, Chapter 22637. No mention is made in the act with respect to "excess" insurance. It would seem appropriate to distinguish between "reinsurance" and "excess insurance."

The term "reinsurance" has a well known meaning. A "reinsurance" contract is the contract that one insurer makes with another to protect the first insurer in whole or in part from the risk he has theretofore assumed by a policy in favor of a third party. *Allemania Fire Ins. Co. vs. Firemen's Ins. Co.*, 209 U. S. 326, 52 L. Ed. 815; *People ex rel Sea Ins. Co. vs. Graves*, 8 N. E. 2nd. 872, 274 N. Y. 312; *Union Central Life Ins. Co. vs. Lowe*, 182 N. E. 611, 349 Ill. 464. And such a contract is wholly for the benefit of the first insurer and not the holder of the policy issued by such insurer; thus, in the absence of agreement, such contract creates no privity between the reinsurer and the insured. *Barnes vs. Hekla Fire Ins. Co.*, 57 N. W. 214, 56 Minn. 38; *Hunt vs. Hampshire Fire Underwriters' Ass'n.*, 38 A. 145, 68 N. H. 305.

"Excess insurance" seems to be insurance payable only after the loss exceeds a certain figure as, for example, when under the terms of the contract it is in excess of primary insurance carried for the same risk. The contract of insurance in such instance is between an insurer and an insured and in this is to be distinguished from a reinsurance contract.

For examples, see *St. Paul Fire & Marine Ins. Co. vs. Gorza County Warehouse & Marketing Association*, C. C. A. Tex., 93 F. 2d. 590, 592; *Consolidated Shippers vs. Pacific Employers Ins. Co.*, 114 P. 2d. 34, 45 Cal. App. 2d. 288; *Gordon vs. Franklin Ins. Co.*, of Philadelphia, 28 N. Y. S. 2d. 480, 262 App. Div. 328; *Fogel Truck & Coach Co. vs. Pacific Indemnity Co.*, 117 P. 2d. 661, 18 Cal. 2d 731; *Travelers Indemnity Co. vs. State Automobile Ins. Co.*, 37 N. E. 2d. 198, 67 Ohio App. 457.

In view of the foregoing, in my opinion the above question is properly answered as follows:

Insurers engaged in the business of insurance as described and contemplated by said Chapter 22637, are required to comply with the provisions of said chapter with respect to "excess insurance" written by them.

December 19, 1946.—046-530.

FILING RATES—DELAY IN TAKING EFFECT—PENALTY

QUESTIONS: 1. Was the use of the old rates after August 3, 1946, a violation of said Chapter 630?

2. If the answer to said question is in the affirmative, what action is open to the insurance commissioner under the law?

3. Can the insurance commissioner require the company to collect the additional premium based on the new rates on papers written after August 3, 1946, at the old rate?

To Honorable J. Edwin Larson, Insurance Commissioner:

Since the insurance commissioner neither approved nor disapproved the filings of July 3, 1946, within thirty days thereafter, the rates provided by such filing became effective August 3, 1946. Section 630.03 (3), 1945 Supplement to Florida Statutes, 1941; and see opinion of this office dated December 4, 1946, our No. 046-480. Thus, for the period from August 4, 1946, to August 28, 1946, this company should have used the new rates provided by said filing, instead of the old rates. Section 630.04 (8), 1945 Supplement to Florida Statutes, 1941.

Section 630.11(1), 1945 Supplement to Florida Statutes, 1941, provides, in effect, that the insurance commissioner may, if he finds that any person or organization has violated any of the provisions of said Chapter 630, impose a penalty of not more than \$250.00 for each such violation, but, if he finds such violation to be willful, he may impose a penalty of not more than \$1,000 for each such violation; and such penalties may be in addition to any other penalty provided by law. It is to be noted, however, that no penalty shall be imposed except upon written order of the commissioner stating his findings, after hearing and notice, as provided in Section 630.11(3), 1945 Supplement to Florida Statutes, 1941.

From the facts available, it is assumed that this company inadvertently violated said Chapter 630 as a result of the following circumstances: (1) Failure to fix an effective date for the rates provided by the new filings a sufficient length of time subsequent to expiration of the thirty day period to permit due notice of change of rates to agents; (2) Difficulty with respect to getting new rates printed and finally resorting to mimeographed sheets for that purpose. The provisions of said Chapter 630 are to be observed; however, the newness of law and the adjusting of business to its requirements warrant consideration.

In my opinion, the above questions properly are answered in their numbered order as follows:

(1) Use of the old rates by this company for the period August 3 to August 28, 1946, constituted a violation of said Section 630.03(8).

(2) If the insurance commissioner considers such violation to warrant imposition of penalty, he may resort to the provisions of said Section 630.11(1) and (3).

(3) Under the circumstances reflected in the above statement of facts, it does not appear that holders of this company's policies issued during the period August 3 to August 28, 1946, may be required to pay the difference between the old and new rates here mentioned.

STATE FIRE MARSHAL

November 2, 1946.—046-445.

LIQUEFIED GAS—REGULATIONS—FIRE HAZARDS

QUESTION: What regulations relating to liquefied petroleum gases may be promulgated in Florida by the state fire marshal?

To Honorable J. Edwin Larson, State Fire Marshal:

In my opinion, certain of these proposed regulations lawfully may be promulgated and certain of them may not. I discuss the several regulations you request and my comment with respect to each.

(1) A regulation requiring that all persons, firms and corporations distributing liquefied petroleum gas in Florida who sell liquefied petroleum gas equipment and appliances, and/or who install the same, shall obtain an annual permit from the state fire marshal of Florida.

Comment: There is nothing in Chapter 633, Florida Statutes, 1941, specifically requiring the issuance of such permits. Yet it would seem that in view of the power of the fire marshal to regulate as set forth in Section 633.05, and of the drastic need for close supervision with respect to the keeping, storing, use, sale, etc., of such product, such a regulation is reasonable, proper and within the authority of Section 633.05, and would provide an authoritative record for the fire marshal of all such persons, firms and corporations affected by the regulations here considered.

(2) A regulation requiring that application for such a permit from persons, firms and corporations dealing in or distributing such product shall be accompanied by evidence that applicant carries insurance with coverage as follows: comprehensive liability including products liability; automotive equipment including loading and reloading of trucks; truck liability while traversing highways in the state or streets in municipalities.

Comment: When a statute of Florida empowers administrative officers, boards or commissions to promulgate rules, the test of the authority to do so is whether or not the statute defines a pattern by which the rule or regulation must be made to conform. See *Arnold vs. State*, 140 Fla. 610, 190 So. 543; *Richardson vs. Baldwin*, 124 Fla. 233, 168 So. 245; *Bailey vs. Van Pelt*, 78 Fla. 377, 82 So. 789; *Hutchins vs. Mayo (Fla.)*, 197 So. 495. The apparent purpose of Section 633.05, Florida Statutes, 1941, is to regulate with respect to fire hazards. Grave doubt exists that there is anything in this section or in Chapter 633, Florida Statutes, 1941, which contemplates regulations requiring insurance to indemnify in the manner here sought. Such would seem to be a matter for the legislature.

(3) A regulation adopting the standards of National Board of Fire Underwriters relating to liquefied petroleum gases, as set out in their pamphlet No. 58, and amendments thereto, as standards to be observed in this state.

Comment: I know of no reason why these standards cannot be adopted by an appropriately worded regulation. However, any such regulation which should attempt to provide also for any subsequent standards prescribed by the National Board of Fire Underwriters would probably constitute an unlawful delegation of power. See *Hutchins vs. Mayo (Fla.)*, 197 So. 495, 498. Thus, such regulation should be confined to those

standards set forth in such pamphlet No. 58 as they presently exist. Subsequent regulations could take care of subsequent amendments of such standards by said board, if the fire marshal should consider such proper.

(4) A regulatory provision fixing a charge for issuance of annual permit.

Comment: I cannot see that the power to provide such a charge is included in the powers of the fire marshal to regulate.

(5) A regulatory provision for cancellation of permit if the holder thereof violates regulations.

Comment: The right of individuals to engage in lawful pursuits is an elementary right and cannot be regulated beyond the needs of public welfare and to the extent provided by statute. Such statutes are subject to strict construction. A regulation of the fire marshal providing for cancellation of permits upon violation of any provisions of said Chapter 633 or regulation lawfully promulgated in pursuance thereof, to be valid must conform to the "pattern" or legislative intent with respect to the purposes for regulation found in Chapter 633, particularly Section 633.05. The legislature by Section 633.16 provided criminal sanctions for violation of any such lawfully promulgated regulations. Obviously, the cancellation of a permit involves property rights and due process. Since the legislature has provided such criminal sanctions, reasonably it may be argued that it was the legislative intent that the penalties so prescribed are the means for coercing observation of such regulations. In view of such provision of law, grave doubt exists that any provision for cancellation of permit, except after conviction under said Section 633.16, is authorized.

October 24, 1945.—045-338.

AUTHORITY TO CLOSE THEATRE

QUESTION: Under the powers vested in the state fire marshal, as set forth in Chapter 633, Florida Statutes, 1941, as amended, is there sufficient authority for him to close a motion picture theatre completely, without possibility of reopening as a theatre in the building in which it is now located and which originally was designed some thirty or forty years ago for a theatre on the theory that since such theatre is located on the second floor of said building, such theatre is "situated so as to endanger life," as such words are used in Section 633.06, Florida Statutes, 1941?

To Honorable J. Edwin Larson, State Fire Marshal:

Whether or not the state fire marshal, under Chapter 633, Florida Statutes, 1941, as amended, may condemn the use of a building for a particular purpose must depend upon an individual case with its given statement of facts. The sole fact set forth in the above question for consideration of the possible exercise of such power by the state fire marshal is that the motion picture theatre mentioned is located on the second floor of a building.

In the absence of law which forbids the operation of such an enterprise on the second floor of a building, and in the absence of evidence that competent authorities on fire hazards and preventive measures are agreed that public welfare demands that such an enterprise so operated be prohibited and condemned, I am not in a position to say that under the law it should be prohibited and condemned. Any order of the state fire marshal having for its purpose the closing of such a theatre would constitute drastic invasion of private property rights. While it is true that the rights of the individual must yield to the police power of the state lawfully exercised in the public welfare, the need for exercise of such power must be apparent. From the standpoint of hazard to the patrons,

it would seem that no real distinction exists between a second-story theatre reached by stairs, and balcony seats, common to many theatres, reached in the same manner. In each instance, the state fire marshal should require that adequate exits are provided, under the power vested in him by Section 633.06, Florida Statutes, 1941.

In view of the foregoing, it appears that the above question properly should be answered as follows:

Since, for the reasons and on the facts above set forth, it does not appear that solely because a motion picture theatre is located on the second floor of a building the further operation of the enterprise should be prohibited, the above question is answered in the negative. It is noted, however, that the duty rests upon the state fire marshal to see that adequate exits are provided for the patrons of such theatre. It is observed, further, that if a more detailed statement should demonstrate that the building in question could not, for stated reasons, be supplied with proper and adequate exits for patrons of such theatre, or if because of other factors such theatre is "situated so as to endanger life or property," as such words are used in said Section 633.06, further inquiry with respect to the power and duty of the state fire marshal would be required.

LIFE INSURANCE, GENERALLY

July 26, 1946.—046-321.

FRATERNAL BENEFIT—DEPOSIT

QUESTION: A fraternal benefit society in pursuance of the requirements of the provisions of Section 635.17 (3) and (4), 1945 Supplement to Florida Statutes, 1941, at or before the times in 1945 required by such provisions, deposited with the insurance commissioner of Florida securities of the face value of \$10,000, which were accepted and approved by the insurance commissioner, with respect to holders of its contingent endowment certificates, as contemplated by said law. The information registered with the insurance commissioner by this society on or before July 15, 1946, evidences that at that time this society had less than 1000 holders of its contingent endowment certificates. The society has requested the insurance commissioner to return to it \$5,000 in face value of such securities. Under the provisions of Section 635.17, is the insurance commissioner authorized to return to the society such part of said securities?

To Honorable J. Edwin Larson, Insurance Commissioner:

Section 635.17 (3), 1945 Supplement to Florida Statutes, 1941, requires that within thirty days after same became a law, any fraternal benefit society issuing contingent endowment certificates should deposit with the insurance commissioner of Florida securities which are by the laws of this state a legal investment of the funds of life insurance companies and of the face value of \$5,000, for the security of the payments of benefits to all such certificate holders, said securities to be approved by the insurance commissioner, and that the fraternal benefit society making such deposit should thereafter on or before the filing of the list of contingent endowment certificate holders as provided in Section 635.17 (4) increase said deposits by the sum of \$5,000 in such securities for each additional one thousand or fractional part thereof of all certificate holders until such deposit should amount to \$25,000.

Said Section 635.17 (4) provides that any such society desiring to continue the writing of said certificates should register with the insurance commissioner the name and address of each certificate holder and the position of each certificate holder in such division and class, within 30 days, after the effective date of such law, and thereafter the same in-

formation should be furnished to the insurance commissioner by the fifteenth day of July of each year.

It would seem to be the intent and effect of said Section 635.17 (3) and (4), that a society or order is required to maintain on deposit with the insurance commissioner only \$5,000 face value of such securities, of the nature and kind required by said law and approved by the commissioner, as to each one thousand or fractional part thereof of holders of such certificates. If it appears that the information required to be registered by this society with the insurance commissioner on or before July 15, 1946, has been filed and evidences that the society has less than one thousand holders of its contingent endowment certificates, than it would seem that the insurance commissioner may surrender to the society \$5,000 in face value of said securities, in pursuance of its demand therefor.

August 19, 1946.—046-354.

INSURER—DEPOSITS—RETURN OF EXCESS

QUESTION: An insurer, in pursuance and under the authority of Section 635.11, Florida Statutes, 1941, heretofore deposited with the insurance commissioner of Florida securities, or real estate in trust in lieu of such securities as authorized by Section 635.12, Florida Statutes, 1941, of a total value substantially in excess of the legal reserve of its outstanding policies and annuity contracts in force, less any loans or liens against such policies not in excess of such legal reserve. The insurer has requested the insurance commissioner to return to it such excess. Is the insurance commissioner authorized to deliver to the insurer the part of such securities or real estate so deposited in excess of the value thereof required to be deposited under said Section 635.11?

To Honorable J. Edwin Larson, Insurance Commissioner:

To avoid confusion, it is remarked that on March 28, 1944 an opinion was delivered to you by me (No. 044-104, Biennial Report of Attorney General, 1943-1944, page 475) concerning real property conveyed in trust by an insurer to the insurance commissioner for the protection of policyholders. An examination of that file indicates that such trust so created was entirely voluntary and not in accordance with or pursuance of any statutory provision.

Section 635.11, Florida Statutes, 1941, provides that any life insurance company incorporated under the laws of Florida, may deposit with the insurance commissioner, "for the common benefit of all the holders of its policy and annuity bonds" securities of the kind described in said law "equal to the legal reserve on all its outstanding policies in force, less any loans or liens against such policies not in excess of such legal reserve."

Section 635.13, Florida Statutes, 1941, requires that when such deposit is made that there be endorsed on each "policy of insurance or endowment or annuity bond, except policies of industrial insurance, or sick and funeral benefit insurance," the following words: "This policy is registered, and approved securities equal in face value to the legal reserve hereon are held in trust by the insurance commissioner."

Section 635.15, Florida Statutes, 1941, provides that upon request of any domestic insurance company, the insurance commissioner may return to such company, the whole or any portion of the securities of such company, when he shall be satisfied that the securities so asked to be returned are subject to no liability and not required to be longer held by any provision of law or purpose of the original deposit.

If this were a deposit made voluntarily for the benefit of policyholders, not in pursuance of the permission or requirement of any law, it

is doubtful if any part thereof less than the full amount of outstanding policies could be withdrawn. *State vs. American Bonding and Title Co. (Ia.)*, 221 N. W. 585; but it is here assumed that the items aggregating the deposit in the instant case were made in pursuance of said Section 635.11. If the provisions of said Section 635.11 stipulated a "minimum" deposit of securities equal to such legal reserve, or a deposit of "not less than" a sum equal to said legal reserve, any excess would probably be impressed with the same trust as that characterizing the minimum required. *Lancashire Insurance Co. vs. Maxwell*, Superintendent of Insurance Department (N. Y.), 30 N. E. 192. But the deposit authorized by said Section 635.11 is certain, i. e., "equal to the legal reserve, etc."—contemplating at all times sufficient deposit to equal in value the amount of such reserve.

In view of the foregoing, in my opinion the above question properly is answered as follows:

(1) If any insurer has on deposit with the insurance commissioner securities as described in said Section 635.11, or real property conveyed in trust in lieu of securities as authorized by said Section 635.12, and the items composing such deposit were delivered to the insurance commissioner in pursuance of said Section 635.11, the part of such property, over and above the amount required by said Section 635.11, properly may be returned to the insurer at the latter's request. It is here noted, however, that the duty devolves upon the insurer to maintain such deposit in an amount equal to the legal reserve, as provided by said Section 635.11, and a sufficient excess should always be on deposit to meet any increase in such legal reserve.

(2) This opinion assumes that each of the several items composing the deposit here involved were deposited by such insurer under the provisions of said Section 635.11. Your records will evidence whether or not this is true. If any item or items making up the total of such deposit were delivered to the insurance commissioner for the benefit of the policyholders and not in pursuance of said Section 635.11, ordinary caution would require that such be handled in a manner different from a deposit in pursuance of said Section 635.11, and would require a more extended examination of your records by me.

June 5, 1946.—046-245.

FORM OF POLICY—SURVIVORSHIP BONUS

QUESTIONS: 1. A certain life insurance company proposes to issue and sell in this state a policy of insurance which, among other things, has the following feature: all policies issued in any year shall be grouped as one class; a specified portion of each full year's premium (\$5.00 for each \$1,000 of the sum insured of such policy, subject to condition therein as to "child's policies") shall be placed in a "survivorship bonus" fund. At the end of each year the fund is to be credited with interest at 3% on the amount of the fund at the beginning of the year. At the end of a specified period the total "survivorship bonus" fund belonging to the class shall be distributed proportionately, as in said policy provided, to those at that time living and who have maintained their policies in force. May such a policy with such a contract feature properly be issued in Florida?

2. A life insurance company proposes to issue and sell in this state a policy of insurance which has the following features: a supplementary agreement attached to the policy providing for a "distribution fund," as additional benefits, created by setting aside and investing into such a fund, one-half of all premiums paid under terms of the policy subsequent to the first premium and except premiums for disability and accidental death, for a period to be provided in the policy. At specified dates during

the period provided for the accumulation of such "distribution fund," distribution to be made from surplus in said fund to which the insured has contributed, due to lapse, earnings, profits and other causes, proportionately to each and every holder of a coupon (as provided in policy) maturing in the same year in which the guaranteed accumulated amount becomes due and payable, the surplus available for distribution to be the accumulations from money deposited in the distribution fund from each and every supplementary agreement issued during the same calendar year as the policy of insured. The insured may elect in lieu of accepting settlements due at such periods to make one settlement on the anniversary date of the policy next succeeding the date insured reaches a certain age. In event of death while the policy and supplementary agreement are in force prior to termination of period during which such fund is accumulating, additional benefits equal to the proportion of premiums paid into the distribution fund are payable. It appears that in instances where a policy is permitted to lapse, the holder thereof loses all interest in the distribution fund. May such a policy with such a contract feature properly be issued in Florida?

To Honorable J. Edwin Larson, Insurance Commissioner:

It will be noted that under the first policy described, those who benefit from distribution of the "survivorship bonus" fund are those alive at the end of the named period and who have maintained their policies in force, and in said distribution they receive all benefits resulting from payments therein from premiums of those who die or permit their policies to lapse during such period.

By the terms of the second policy, death does not cancel all claims of the beneficiary to additional benefits from the "distribution fund," but if an insured permits a policy to lapse, the amounts of his premiums theretofore paid into said fund are lost to him, and those who share in the distribution of said fund are benefitted thereby.

It may be that the above proposed forms of contracts offend certain of our laws relating to life insurance (for example, Section 635.02, Florida Statutes, 1941); however, such possible instances are not here noted in view of the position taken in the succeeding paragraph hereof.

It would seem that when an inducement for entering into an insurance contract is the opportunity afforded to the policyholder to speculate on benefits resulting from outliving other policyholders, in whose lives he has no insurable interest, such a contract is contrary to public policy. *Knott vs. State ex rel. Guaranty Income Life Ins. Co.*, 136 Fla. 184, 186 So. 788, *Colgrave vs. Lowe*, 343 Ill. 360, 175 N. E. 569 (writ of certiorari denied 284 U. S. 639, 76 L. Ed. 544). And it would seem the same rule is applicable where a policyholder is given the opportunity to speculate on benefits resulting from amounts paid by others who permit their policies to lapse, in whose lives the policyholder has no insurable interest.

In view of the above, in my opinion the two questions properly are answered as follows:

It would seem that the forms of policies described in the two questions above contain contract features, as noted, which are contrary to the public policy of the State of Florida.

FRATERNAL BENEFIT INSURANCE

October 23, 1945.—045-333.

INSURANCE COMMISSIONER—LICENSE TAX FOR AGENTS

QUESTION: Are fraternal benefit societies operating under Chapter 637, Laws of Florida, Acts of 1941, as amended, required to pay to the

state treasurer annual license taxes for their agents in the same manner that other insurers are required to pay such taxes for their agents?

To Honorable J. Edwin Larson, Insurance Commissioner:

Section 637.11, Florida Statutes, 1941, in effect provides that, except as set forth in Chapter 637, Florida Statutes, 1941, fraternal benefit societies shall be governed by such chapter, and shall be exempt from all provisions of the insurance laws of Florida for every purpose, and that no law enacted shall apply to such societies unless they be specifically designated therein. Section 637.11 is the original Section 4 of Chapter 6970, Laws of Florida, Acts of 1915. However, mention is made that by Chapter 22858, Laws of Florida, Acts of 1945, such law was adopted anew by our legislature.

Prior to the 1945 session of our legislature, Section 205.45, Florida Statutes, 1941, provided that each person engaged in the insurance business in this state who sold or wrote insurance through or employed agents or solicitors should furnish the names and addresses of such agents or solicitors to the state treasurer on the first day of October of each year, and pay the tax required thereby. This section was amended by Chapter 22737, Laws of Florida, Acts of 1945, the only material change effected being that such insurers should pay to the state treasurer in addition to the state tax also a county license tax with respect to such agents. Neither said Section 205.45 nor Chapter 22737 specifically by name included among such insurers fraternal benefit societies. It would appear that it was not the legislative intent to include agents for such societies in the coverage of said chapter.

Chapter 22671, Laws of Florida, Acts of 1945, prescribed license taxes and premium receipts taxes payable by insurers named therein, including fraternal benefit societies; but such act has no application to license taxes required with respect to agents of such insurers.

There is yet another indication that it was not the legislative intent to bring agents of fraternal benefit societies under the provisions of said Chapter 22737. Section 625.01 (1) (c), Florida Statutes, 1941, defining an insurance agent, read in conjunction with paragraphs (5) and (6) of said section, would appear to include any person engaged in soliciting membership in a fraternal benefit society for the purpose of the issuance to such prospective member of a benefit certificate or other form of contract with insurance features issued by such a society. It does not appear, however, that a fraternal benefit society, as defined in Section 625.01 (3) is intended also to be included in the definition of "life insurance company" or "life insurer" as defined in Section 625.01 (7) even though its reserve should meet the requirements for such latter insurers. Chapter 627, Florida Statutes, 1941, provides for the qualification and licensing of (1) life insurance agents, (2) sick and funeral benefit insurance agents, and (3) agents for fire insurance and its allied lines, marine insurance, and contracts for indemnity, fidelity and suretyship. Since none of these named agents appear to include agents for fraternal benefit societies, it would appear that we have no law providing for the qualification and licensing of an agent of such a society.

In view of the foregoing, in my opinion the above question properly is answered as follows:

Chapter 22737, Laws of Florida, Acts of 1945, requiring insurers, as therein contemplated, to pay to the state treasurer license taxes for their agents or solicitors does not appear to include agents of fraternal benefit societies in its coverage. Hence, the above question must be answered in the negative.

January 10, 1946.—046-12.

TRANSFER OF ASSETS

QUESTION: Prior to July 28, 1945, Union Life Insurance Association was doing business in Florida as a fraternal benefit society under Chapter 637, Florida Statutes, 1941. On July 20, 1945, Union deposited with the insurance commissioner its certified check, payable to the state treasurer, in the amount of \$25,000 to comply, so it is stated, with Chapter 22636, Laws of Florida, Acts of 1945. On July 26, 1945, Union entered into agreement with American Life Insurance Company of Birmingham, Alabama, under which American assumed all obligations and liabilities of Union, and Union sold, conveyed and transferred to American all its property and assets. American has deposited with the state treasurer \$25,000 U. S. bearer or coupon bonds, approved by the insurance commissioner to be substituted for Union's certified check, and has requested that the treasurer endorse and deposit for American's account in Capitol City Bank, Tallahassee, Florida, such certified check. (1) Is the Treasurer authorized to release the certified check? (2) If so, is it proper to comply with the request of American relative thereto?

To Honorable J. Edwin Larson, Insurance Commissioner:

The agreement whereby Union Life Insurance Association transferred to American Life Insurance Company its property and assets would seem to have included in such described property and assets the above certified check. This agreement was approved by the "Florida Insurance Department, by C. J. McCann, Deputy Insurance Commissioner and Actuary." No request is here made for my opinion as to the legality of the above agreement, and such question is not here considered. For the purposes of this opinion, it is assumed that the transfer of all its property and assets by the Union to the American, under the circumstances related in said agreement, was in accordance with law and binding upon contract, policy or certificate holders of Union; and this opinion is conditioned upon such assumption. The bonds sought to be substituted for said check are in the amount and of the character required by law. Chapter 22636, Laws of Florida, Acts of 1945, and Section 626.06, Florida Statutes, 1941.

In view of the foregoing, and on the basis stated, it appears the above questions are answered in their numbered order as follows:

(1) The state treasurer is authorized to release said \$25,000 certified check of Union Life Insurance Association.

(2) There would seem to be no impropriety in the state treasurer endorsing such check and depositing same to the account of American Life Insurance Company, as requested. However, since the check, as delivered, was the check of Union Life Insurance Association, to avoid all chance for misunderstanding, it is recommended that prior to the release of such check, in the manner above outlined, the state treasurer shall procure from the officials of Union Life Insurance Association a letter authorizing his endorsement and release of such check, in pursuance of the request of American Life Insurance Company.

SICK AND FUNERAL BENEFIT INSURANCE

July 16, 1946.—046-303.

FUNERAL DIRECTORS AS AGENTS—COLLECTORS

QUESTIONS: 1. What effect, if any, do the provisions of Section 638.16, Florida Statutes, 1941, (Chapter 22028, Laws of Florida, Acts of 1943) have with respect to a contract subsisting at the time of the passage of said law between a life insurance company writing sick and funeral insurance and a funeral director, by the terms of which the latter is to "solicit and write applications for insurance policies * * * countersign said policies and deliver to applicant, collect dues on all policies so written * * * ?"

2. In addition to the general effect of such law with respect to said contract, specifically, may said funeral director continue to collect the dues or premiums on the policies written by him for said company under the terms of the contract prior to enactment of said Section 638.16?

To Honorable J. Edwin Larson, Insurance Commissioner:

It is too well recognized to require the citation of authorities that the business of insurance is charged with public interest and is subject to reasonable regulations.

Agents for life insurance companies selling and collecting the premiums upon sick and funeral benefit insurance are subject to the regulatory laws of Florida prescribing the qualifications of life insurance agents Sections 625.01 (7-8) and 627.27, Florida Statutes, 1941. Above mentioned Section 638.16 specifically bears upon the qualifications of such agents with respect to sick and funeral benefit insurance.

Said Section 638.16 makes it unlawful for any insurer doing business in Florida to permit any funeral director or undertaker to act as agent for such insurer in collecting premiums from holders of sick and funeral benefit insurance policies issued by such insurer, or to do certain other things therein described. Among other activities of an insurance agent may be that of receiving premiums for an insurer, Section 625.01 (1) (b), Florida Statutes, 1941.

It is recognized that Article I, Section 10, United States Constitution, prohibits the states to enact laws impairing the obligations of contracts. But all contracts are subject to the police power of the state and the exercise of such power is never understood to involve their violation. Contracts made in the conduct of a business that is subject to state regulation are also subject to such regulation. *Osborne vs. Nicholson*, 13 Wall. 654; *Rast vs. Van Deman & L. Co.*, 240 U. S. 342.

In view of the foregoing, in my opinion the above questions properly are answered in their numbered order as follows:

(1) It would seem that the provisions of said Section 638.16 constitute a valid exercise of the police power of the state; hence, the contract mentioned in this question must yield to such law.

(2) As stated above, the collection of premiums is a possible activity of an insurance agent. Said Section 638.16 would seem to prohibit an insurer from permitting a funeral director to act as its agent for such purpose with respect to policies issued prior or subsequent to the passage of said law.

February 26, 1946.—046-84.

PREMIUM PAYMENT—EFFECTIVE DATES

QUESTIONS: 1. What are the effective dates of Chapters 22671 and 22749, Laws of Florida, Acts of 1945, as to insurance companies being subject to premium taxes?

2. Will those companies which were not required to pay premium taxes prior to the passage of these acts be required to pay taxes on premiums collected for the entire calendar year of 1945 or for only that part of the year subsequent to the effective dates of said acts?

To Honorable J. Edwin Larson, Insurance Commissioner:

Chapter 22671 became a law on May 23, 1945, and Chapter 22749 became a law on May 30, 1945.

Section 2 of Chapter 22671 says:

"Should such insurer, as defined herein, fail to pay to the state treasurer the taxes required by paragraph (2) of preceding

Section 1 of this Act (being the premium tax) on or before the first day of March in each and every year, the certificate of authority issued to such insurer, as defined herein, to transact business in this State may be revoked by the state treasurer . . ."

In my opinion, therefore, said premium tax, in order for such insurer to transact business in this state during 1946, must be paid on or before the first day of March, 1946, on the premiums collected in the preceding calendar year, to wit: 1945.

Chapter 22749 merely provides an optional method to such insurer of computing and paying premium receipt taxes.

Section 1 of Chapter 22671 says:

"Every insurer . . . domestic or foreign . . . shall pay to the State Treasurer of Florida as a condition precedent to doing business within the State the license and premium receipts taxes hereinafter mentioned to wit:

"(1) A license tax of two hundred dollars per annum . . .

"(2) In addition to the above mentioned license taxes each of said insurers . . . shall also annually and on or before the first day of March in each year pay to the State Treasurer a tax on insurance premiums or assessments . . . received during the preceding calendar year, the amounts thereof to be determined . . . : An amount equal to two per cent of the gross amount of receipts of insurance premiums . . ."

As penalty for failure of an insurer to pay such tax on such insurance premiums on or before the first day of March in each and every year, the state treasurer may revoke the certificate of authority of such insurer to do business in the State of Florida (see Section 2 of said Chapter 22671).

The legislature set forth the occupational tax for such insurers to be two hundred dollars per annum plus a percentage on the insurance premiums collected during the preceding calendar year. This means that on or before March 1, 1946, each and every insurer affected by Chapter 22671 must pay to the State Treasurer a tax on insurance premiums received during the preceding calendar year which is the entire year of 1945. The legislature could have adopted any formula that it desired. It might have said tax premiums collected during the year 1940 or 1941 or whatever the legislature may have desired to be a reasonable formula, but it said the last preceding calendar year.

BURIAL INSURANCE

May 9, 1946.—046-203.

DEED OF TRUST—RELEASE

QUESTION: Under the following statement of facts, may the insurance commissioner safely execute quitclaim deed which, in effect, will release any or all of the land described in said deed of trust?

To Honorable J. Edwin Larson, Insurance Commissioner:

On January 9, 1945, by contract approved by the insurance commissioner, Afro-American Life Insurance Company (referred to as Afro-American) assumed and reinsured all outstanding contracts of insurance of Peoples Burial and Insurance Company (referred to as Peoples) "in force and effect on the books" of Peoples at the time of the making of said contract. Peoples' deposit of \$8,400 in bonds with the Insurance Commissioner was transferred to Afro-American. On September 10, 1935, Peoples executed to the then insurance commissioner of Florida a "deed of trust" covering certain parcels of real property in Duval County, Florida, same

being executed "in trust for the protection of the claims of all policyholders, now or hereafter arising," the Peoples to have release of such property upon substitution of other property of equivalent value. (For necessary and more complete details concerning said "deed of trust," see our opinion No. 044-104, Biennial Report of Attorney General, 1943-1944, page 475). Request has now been made for release of part of the lands described in the deed of trust.

From the facts above, supplemented by our aforesaid opinion No. 044-104, it appears that this deed of trust was executed voluntarily by Peoples, and not in accordance with any statutory or legal requirements.

Since the instrument was executed in 1935, long prior to the time Peoples ceased to do business, it is assumed that in view of the purposes for which executed, the corporation could hardly claim the act was an ultra vires one.

It is assumed that when Afro-American assumed such contracts of Peoples, that the former company met the full minimum requirements of the applicable laws relating to required deposit, reserve and financial status otherwise. Granting such to be true, if the agreement whereby Afro-American assumed such contracts of Peoples constituted an assumption of all contracts with policyholders of the latter company, it might reasonably be urged that on the authority of *State ex rel. Union Indemnity Co. vs. Knott*, State Treasurer, 105 Fla. 569, 143 So. 296, any required deposits of Peoples not transferred to Afro-American properly could have been released to Peoples by the insurance commissioner; and by the same reasoning, the real property involved in said trust deed could have been so released. It does not appear, however, that in such case the rights of individual parties to contracts involved in such a transfer were specifically before the court or considered by the court. Despite the express finding of the court in such case, grave doubt must exist that an insurer may obtain release from a contract with an insured by entering into an agreement with another insurance company by which the latter assumes the performance of such contract, in the absence of consent of the insured. It is recognized that the insured could consent to such transaction in writing or by conduct, as for example, the payment of premium, without condition, to the purchasing company.

The chance that there are now outstanding claims of any policyholders of Peoples is perhaps remote, but the possibility can hardly be ignored.

In view of the foregoing, in my opinion the above question properly is answered as follows:

Unless there is reason for the insurance commissioner to hold said deed of trust, he should execute appropriate instrument releasing the land therein described to Peoples Burial and Insurance Company. If the following facts exist, it appears that properly the insurance commissioner may release such property to said company:

(1) That Afro-American Life Insurance Company has met all the requirements of law relating to deposits, reserves and financial status otherwise, with respect to the contracts of Peoples Burial and Insurance Company assumed by the former; and

(2) That Peoples Burial and Insurance Company did not include in the sale of its insurance business to Afro-American Life Insurance Company, the real property described in said deed of trust; and

(3) That there are no lawful outstanding claims of policyholders against Peoples Burial and Insurance Company. It is here suggested that unless the insurance commissioner is satisfied there are no such claims, as a condition precedent to release of such lands it would not be unreasonable for him to require bond of Peoples Burial and Insurance Company, with corporate surety, in such amount as he might deem equivalent to the value of the property to be released, conditioned to pay any such lawfully adjudged claims not satisfied by said company.

BENEVOLENT MUTUAL BENEFIT ASSOCIATIONS

July 6, 1945.—045-177.

GUARANTY RESERVE FUND—AUTHORIZED EXPENDITURE

QUESTION: For what purpose may the guaranty reserve fund of benevolent mutual benefit associations, organized and existing under Chapter 640, Florida Statutes 1941, as amended, be expended?

To Honorable J. Edwin Larson, Insurance Commissioner:

The question requires an understanding of the nature of a benevolent mutual benefit association existing under and as contemplated by Chapter 640, Florida Statutes, 1941, as amended. Section and chapter numbers hereinafter employed refer to Florida Statutes 1941 (in certain instances, as amended) unless otherwise indicated.

No stock is issued by such an association. Members of the association are the certificate holders. The affairs of the association are handled and governed by a board of directors elected by the members (Section 640.15). As contemplated by Chapter 640, there is no group except the members who have an interest in and power over the association. The members as a group (i. e. the corporation) are the insurers, and as individual certificate holders are the insured.

Certificates held by members of the association are not issued by the latter on a fixed or level premium basis. By Section 640.19, such certificates are maintained by assessments which shall be such as to produce from certificate holders a sufficient amount to cover (1) actual mortality experience, (2) the guaranty and reserve as provided by Chapter 640, and (3) operating expenses, which latter item, except when definitely set forth in the face of the certificate, shall not exceed a certain percentage of the assessments as provided by Section 640.19.

As a prerequisite to doing business, the association must deposit with the insurance commissioner cash or bonds, as contemplated by Section 640.09, in the amount of \$25,000 (guaranty reserve fund). By Section 640.10, this fund is annually increased, as of January 31st of each year, by an extra assessment of \$1.00 on each certificate or contract of \$1,000.00 or fractional part thereof. Section 640.11 provides that in cases of emergencies, and subject to approval of the insurance commissioner, the association is permitted to draw upon said fund to pay valid and approved claims, but never in any one year in a greater amount than that collected and deposited for the previous year, and not more than one withdrawal is permitted in a period of twenty-four months. In event of liquidation, the fund is disbursed for the benefit of claims under policies or certificates, and after such claims have been satisfied, for benefit of other claimants.

Section 640.12 provides that any unsettled judgment of a court of competent jurisdiction in Florida shall be a lien on such initial deposit and guaranty reserve fund, under the circumstances provided in said section. It is felt, however, that such judgment must be based on a claim which may be paid from withdrawals from said fund.

It would appear that a benevolent mutual benefit association, as contemplated by Chapter 640, as amended, is a mutual insurance company as such a company is commonly and technically defined. *Penn Mutual Life Insurance Co. vs. Lederer*, 252 U. S. 523, 64 L. Ed. 698. *Equitable Life Assurance Society v. Bowers*, 2 Cir., 87 F. 2d. 687.

The amounts of regular assessments, as provided by Section 640.19, if regularly and properly made, are normally sufficient to take care of all claims arising under outstanding certificates and to cover necessary operating expenses.

The courts of this state have never construed the purposes for which withdrawals may be made from the guaranty reserve fund, as provided in Section 640.11, in the instance of an association operating and doing business; and in the absence of a court decision, the question is not definitely settled. However, a study of Sections 640.09, 640.10, 640.11, 640.12 and 640.19 leads me to assume the position that the amount which may be used for all operating expenses and for payment of all claims other than those arising under certificates, is limited to the percentage of the regular assessments as fixed by Section 640.19, or the percentage set forth in the face of the certificate, stated as available for operating expenses. It is my further judgment that such percentage of receipts so available for said purposes is not an outright grant thereof, but merely prescribes the limit which may be used for payment of legitimate operating expenses of, or such claims against, the association under active management thereof by the members through their duly elected board of directors.

The guaranty reserve fund (i.e. the original deposit and annual addition thereto) appears to have been required as a reserve in excess of any normal requirements with respect to claims arising under outstanding certificates and as a reserve for the primary benefit of certificate holders.

In view of the foregoing conclusions, and subject thereto, in my opinion the above question is properly answered as follows:

(1) Withdrawals may be made from the guaranty reserve fund under the circumstances and as provided in Section 640.11 for payment of claims arising under outstanding certificates of the association.

(2) In the event of liquidation of an association, such fund is required to be disbursed, first, for the benefit of certificate holders as their legal rights may be made to appear, and then, after such claims have been fully satisfied, balance, if any, to be disbursed for the benefit of other claimants; provided, that in event of liquidation, cost thereof would constitute a prior claim against such fund.

November 6, 1946.—046-470.

CONVERSION—STATUS OF RESERVE FUND

QUESTIONS: 1. When a certificate holder in a benevolent mutual benefit association converts his certificate to a legal reserve or level premium policy, should that portion of the guaranty reserve fund provided by Sections 640.09 and 640.10, Florida Statutes, 1941, to which said holder has contributed on his assessable certificate, as in said laws provided, be set aside in a policy reserve fund for the benefit of legal reserve policies or should it remain in the guaranty reserve fund?

2. Is the guaranty reserve fund to which holders of membership certificates contribute, but to which the legal reserve members no longer contribute, liable for the payment of losses on legal reserve policies?

To Honorable J. Edwin Larson, Insurance Commissioner:

The guaranty reserve fund mentioned above derives from the required \$25,000 minimum deposit (Section 640.09, Florida Statutes, 1941) and an annual assessment on individual certificates (Section 640.10, Florida Statutes, 1941). It appears rather obvious from Sections 640.11 and 640.12 that the primary purpose for which such deposit is held by the insurance commissioner is for the benefit of the holders of membership certificates issued by a benevolent mutual benefit association.

Chapter 22539, Laws of Florida, Acts of 1945, authorizes, as therein provided, a benevolent mutual benefit association to "transform" into a legal reserve or level premium company. Said act provides that such amendment or reincorporation shall not affect existing suits, rights or

contracts and that, when such transformation is effected, the members of such benevolent mutual benefit association may convert their certificates into legal reserve or level premium policies, and that all members not so converting shall continue to be assessed as then provided by law. Such act further provides that no benevolent mutual benefit association shall be granted the authority to so transform itself into a legal reserve or level premium company unless at the time of its transformation it has on deposit with the insurance commissioner at least \$100,000 in its guaranty reserve fund, and that no further deposits shall be required for it to transact business or secure the certificates of authority.

It is thought proper to refer to Chapter 22555, Laws of Florida, Acts of 1945. By this act the organization of such benevolent mutual benefit associations, as contemplated by Chapter 640, Florida Statutes, 1941, was thereafter prohibited. However, it is pointed out that the act specifically provided that such associations as were then licensed to do business in this state could continue to operate and carry on such business. There would seem to be nothing in this act or in said Chapter 22539 which would contemplate a cessation of the issuance of membership certificates by associations then in existence; indeed, it is obvious that were there a cessation in the issuance of such certificates, progressively as holders thereof died, the assessments required of surviving members would increase to such point as to freeze out the surviving members. It is not thought that such was the legislative intent when it enacted said Chapter 22539.

These holders of membership certificates who do not elect to convert their certificates to legal reserve or level premium policies, as permitted by said Chapter 22539, must continue to pay the annual assessment for the guaranty reserve fund as required by said Section 640.10; whereas, those who so convert are not liable for such an assessment. As mentioned above, the law which requires the guaranty reserve fund indicates the purpose of the fund is primarily for a certain class of insureds—holders of membership certificates. The laws neither require nor contemplate that there shall be a deposit for the benefit of those who convert to legal reserve or level premium policies.

Over and beyond the apparent requirements of the law, there is the additional theory that the law having created a trust fund for the benefit of a certain class of insureds, even a subsequent positive law seeking to divert any of such funds to another purpose would be ineffectual. Cases dealing with this question, involving voluntary and involuntary deposits, are not in harmony. Those which appear to support the theory are: *Lancashire Ins. Co. vs. Maxwell* (New York), 30 N. E. 192; *State vs. American Bonding & Title Co. (Ia.)*, 221 N. W. 585; *Maurer vs. International Ins. Corp. (Del.)*, 194 A. 360; *Cochrane vs. Pacific States Life Ins. Co. (Colo.)*, 27 P. 2d. 196; and *Van Gelder vs. Parker (Colo.)*, 193 P. 664. Two cases apparently opposed to this theory are: *Illinois Life Ins. Co. vs. Tully (Kan.)*, 174 Fed. 355, and *Freeman vs. Industrial Mut. Indemnity Co. (Ark.)*, 141 S. W. 508. In my opinion, it would seem to be the better rule as applied to the circumstances here that the law in requiring the guaranty reserve fund has created a trust from the purposes of which no part of said fund may be diverted.

In view of the foregoing, in my opinion the above questions are properly answered in their numbered order as follows:

(1) When holders of membership certificates convert to legal reserve or level premium policies, as contemplated by this question, no part of such guaranty reserve fund to which they may have theretofore contributed shall be set aside into a fund for the benefit of such persons or as an incident of their policies or rights thereunder. Under such circumstances, the guaranty reserve fund continues to be held by the insurance commissioner for the primary benefit of holders of membership certificates and for the purposes for which it was required.

(2) In view of the foregoing paragraph, an answer to this question seems unnecessary; however, specifically it is stated that, under the circumstances contemplated by this question, the guaranty reserve fund is not liable for losses under, or held for the benefit of, persons who have converted to legal reserve or level premium policies.

February 16, 1945.—045-46.

ULTRA VIRES AGENCY CONTRACT—REIMBURSEMENT

QUESTION: Where a sales agency agreement between a benevolent mutual benefit association and a corporation for profit is held ultra vires and contrary to law, may the benefit association pay to the stockholders of such corporation, who were in no way interested in the benefit association, the amount paid for their stock, where all or a portion of said amount paid was used for the benefit of the said benefit association?

To Honorable J. Edwin Larson, Insurance Commissioner:

This is in pursuance of your request for my opinion with respect to the regularity of certain proposed action to be taken by the insurance associations mentioned below in this letter. The facts set forth below are those represented to exist by Mr. "X" an officer in both of the insurance associations mentioned, and Mr. "Y," his attorney; and the conclusions reached in this letter are conditioned upon the existence of such facts and circumstances as represented.

"A" Benefit Company is a corporation organized and existing under the benevolent mutual benefit association laws (Chapter 640, Florida Statutes, 1941), with its principal place of business located at Orlando, Florida.

"A" Sales Agency, Inc., is a corporation organized and existing under the general law with respect to corporations for profit. Heretofore a contract was entered into between "A" Benefit Company and "A" Sales Agency, Inc., whereby a percentage of the receipts of the insurance corporation are payable to the agency corporation, and the latter, for the practical purposes of this letter, operates and finances the overhead expenses of the insurance corporation.

During the year 1944 certain of the persons interested in "A" Benefit Company and "A" Sales Agency, Inc., purchased "M. and B." Guaranty Company (organized under Chapter 640, and having its principal place of business in Jacksonville, Florida), for the sum of between \$12,000 and \$13,000, and reorganized said insurance company under the name of "N" Benefit Company and moved its principal place of business to Tampa, Florida. At or about the time of this transfer "N" Sales Agency, Inc., was organized. Of \$29,000 of its stock issued and sold at par, between \$12,000 and \$13,000 thereof was issued to persons not interested in "A" Benefit Company, "A" Sales Agency, Inc., or "N" Benefit Company, the remainder of such stock being issued to persons interested in certain or all of such named concerns. An agency contract, similar to the one existing between "A" Benefit Company and "A" Sales Agency, Inc., was entered into between "N" Benefit Company and "N" Sales Agency, Inc.

Of the \$29,000 paid for stock of "N" Sales Agency, Inc., between \$12,000 and \$13,000 thereof was either paid directly to "M. and B." Guaranty Company (the aforesaid consideration therefor), or paid to reimburse the individuals who had advanced such consideration; and the remainder of such \$29,000 was expended solely for the purpose of building up "N" Benefit Company, by increasing its mortuary fund, guaranty reserve fund and by building up agencies for such company. "N" Sales Agency, Inc., has paid no dividend.

Recently the insurance commissioner of Florida, in pursuance of an opinion of this office, advised "A" Benefit Company and "N" Benefit

Company that the aforesaid agency contracts they theretofore had entered into with "A" Sales Agency, Inc., and "N" Sales Agency, Inc., respectively, were ultra vires contracts and must be terminated by a date named by the commissioner. Officers of the two insurance corporations and the two agency corporations propose the following, subject to approval of the insurance commissioner:

1. That the agency contracts shall be terminated.

2. That "A" Benefit Company shall take over "N" Benefit Company; that management and control of "A" Benefit Company be returned to and exercised by it; and that those in charge be paid reasonable compensation for future services for their control and management of such insurance company out of receipts of said company permitted under the law for operating expenses.

3. That in carrying out the plans herein outlined, no amount shall be paid by or chargeable to "A" Benefit Company, except the following, to wit: that there be entered on the books of "A" Benefit Company accounts payable to those stockholders of "N" Sales Agency, Inc., who are not interested, as aforesaid, in either "A" Benefit Company, "N" Benefit Company or "A" Sales Agency, Inc., for the par value of their stock in "N" Sales Agency, Inc., being the actual amounts so paid by them for such stock, and aggregating between \$12,000 and \$13,000, payable as funds are available out of the portion of receipts of "A" Benefit Company permitted under the law for operating expense.

4. That at the coming session of the legislature officials of "A" Benefit Company shall seek to have enacted legislation authorizing corporations organized and existing under Chapter 640 to reincorporate for transaction of an insurance business on a legal reserve basis.

My opinion with respect to the above proposed action is as follows:

It is assumed that such agency agreements will be terminated by appropriate action of all corporations involved. It is further assumed that in the event that "A" Benefit Company takes over "N" Benefit Company, such action shall be taken in due and legal form, after agreement of the members of such companies and in a manner agreeable to the insurance commissioner. It would seem, therefore, that the real question presented by the above is that of whether or not, in the event that "A" takes over "N" there may properly be entered on "A's" books accounts payable to stockholders of "N" Sales Agency, Inc., not interested in either the two insurance companies or in "A" Sales Agency, Inc., for the amount paid for their stock. From the representations made, such accounts payable would be the only cost chargeable to "A" for cancellation of such agreements and assumption by "A" of the business of "N"; and it is assumed that such plan would be agreed to by appropriate action, by the two insurance companies and the two agency corporations.

It is assumed that the sum of between \$12,000 and \$13,000 paid as consideration for "M. and B." Guaranty Company was not paid to the company but to those in charge of the management and control thereof. In the absence of bona fide accounts of the persons receiving such money against such company, for money advanced for the benefit of such company, it does not seem that such part of the capital assets of "N" Sales Agency, Inc., expended as aforesaid, could properly be charged against "A" Benefit Company.

However, from representations made as aforesaid, it appears that the remainder of the \$29,000 realized by "N" Sales Agency, Inc., from sale of its stock, was expended by said corporation for the benefit, as aforesaid, of "N" Benefit Company; and it would seem that such expenditure would occupy the same status as an account payable for money borrowed in good faith by "N" Benefit Company and expended by it, within lawful limits, for the benefit of such company and its members.

Since this sum so expended by "N" Sales Agency, Inc., for the benefit of "N" Benefit Company is in excess of the sum proposed to be paid by "A" to the certain stockholders of "N" Sales Agency, Inc., heretofore mentioned and described, it would seem that the assumption of such accounts under the circumstances mentioned, by "A" Benefit Company would be proper, subject to the following, to wit: (1) That members of "A" agree thereto after due notice; (2) That the assumption of such accounts is in accord with and within the "A's" charter provision with respect to the borrowing of money; and (3) That the assumption of such accounts, together with any other indebtedness of "A," does not offend any charter provision with respect to limit of indebtedness which "A" may incur.

December 27, 1946.—046-529.

RESERVE FUND—CONDITIONS FOR WITHDRAWAL

QUESTION: The American Benefit Company, originally organized as a benevolent mutual benefit association under the provisions of Chapter 640, Florida Statutes, 1941, and now transformed into a legal reserve or level premium company in pursuance of Section 640.29, Florida Statutes, 1941, has requested the insurance commissioner to permit it to withdraw from its guaranty reserve fund, in pursuance of Section 640.11, Florida Statutes, 1941, the sum of \$18,000, to be used by it in the payment of valid and approved claims under assessment certificates. Will the insurance commissioner be justified under the law in granting this request of said company?

To Honorable J. Edwin Larson, Insurance Commissioner:

This opinion is limited to the extent and effect of said Section 640.11 and the circumstances therein provided under which such withdrawal may be made. To attempt to go beyond that would require a knowledge of said company which I do not possess.

From information which accompanied the request for opinion, it appears that this company in times past has taken over or assumed to take over certain other mutual benefit associations, as indicated below. An examination by the insurance department as of November 30, 1946, discloses that, there were then the following unpaid and approved claims against said company under assessment certificates (as distinguished from legal reserve or level premium policies) in the respective amounts and originally issued by the companies mentioned: American Benefit Company, \$19,030.83; National Benefit Company (formerly Merchants and Bankers), \$1,596.42; Federal Mutual Life Association, \$9,135.66; old National Benefit, \$187.14; and old Federal Mutual, \$682.49.

It is contemplated that if the requested sum is made available, the entire amount thereof will be applied toward payment only of the outstanding claims owing with respect to certificates written directly in the American Benefit group.

With these preliminary statements, in my opinion your above question, limited as aforesaid, properly is answered as follows:

The provisions of said Section 640.11 authorize withdrawal of funds from the guaranty reserve fund as requested by this company if the following conditions exist:

(1) That the insurance commissioner determines an "emergency," within the meaning of said Section 640.11 exists. Such "emergency" exists only if valid and approved claims under assessment certificates of the company have accrued and no funds lawfully applicable to such purpose are available for payment thereof.

(2) The guaranty reserve fund is a trust created by statute for the benefit of a group of insureds, and the insurance commissioner is the

trustee thereof. Should the insurance commissioner determine that such an emergency exists as to authorize the withdrawal of the amount here requested, he should directly supervise the disbursement of such amount by the company to those entitled thereto and having valid, approved and unpaid claims under assessment certificates.

(3) The amount of the withdrawal shall not exceed the amount derived from the extra assessment (Section 640.10) for the previous year. Since it is contemplated that such withdrawn funds are to be used only for the payment of claims arising under contracts "written directly in the American Benefit Group," it would seem apparent that the amount withdrawn shall not represent any part of the total amount derived by the company from such extra assessment for the previous year and applicable exclusively to any "group" other than the "American Benefit Group."

(4) All that this opinion contains is predicated upon the assumption that no withdrawal has been made by this company from its guaranty reserve fund, under said Section 640.11, during the last twenty-four months; and if any such withdrawal has been made during such period, nothing in this opinion contained is applicable.

SURETIES AND SURETY COMPANIES

July 16, 1945.—045-183.

JUDGMENT—CLAIM ON SECURITIES

QUESTIONS: 1. Where a person obtains final judgment against a surety company on a surety bond executed by said company, conceding that due notice has been given the insurance commissioner that such judgment has not been paid within thirty days as required by Section 648.10, Florida Statutes, 1941, when does such judgment become and constitute a prior claim upon securities of said surety company deposited with the insurance commissioner as contemplated and in pursuance of said Section 648.10?

2. Where the judgment described in the preceding question was rendered on May 30, 1945, and the attorneys of the judgment creditor by letter to the insurance commissioner dated June 23, 1945, notified the latter that their client had obtained such judgment, that no appeal had been prosecuted therefrom or supersedeas bond filed with respect thereto, that same was unpaid and that when the thirty-day period had passed they would wish to have the commissioner segregate bonds or securities deposited with the commissioner by the surety company to cover such judgment, interest and cost, subject to the order of the court wherein such judgment was rendered, and that in the meantime, if the judgment was paid or otherwise disposed of, they would immediately notify the commissioner by wire, does such notification constitute sufficient notice for the purpose and within the meaning and requirements of Section 648.10, Florida Statutes, 1941?

To Honorable J. Edwin Larson, Insurance Commissioner:

In addition to the facts reflected in the above questions, the following additional statement is made:

The judgment was obtained in the United States District Court for the Southern District of Florida, Miami division, in the amount of \$49,-460.82, interest thereon at 8 per cent from October 13, 1944, and costs. On June 27, 1945, the surety company advised you by telegram that they had ninety days from date of the judgment to appeal same, and that an appeal would be taken, or, in the alternative, the company would pay whatever proper bond liability it had to the judgment creditor. On June 28, 1945, attorneys for the judgment creditor again wrote you, from

which letter it is inferred that on such date the judgment was unpaid, no appeal had been taken, and said attorneys again requested that enough of the defendant's securities in your possession to cover the judgment be segregated, subject to such order as might be entered on such attorneys' application to the judge of the aforesaid court.

For the purposes of this opinion, I assume that no appeal has been taken by the surety company with respect to said judgment, that said judgment, interest and costs are unpaid, and that the foregoing notices are all the notices you have received from the judgment creditor, or his attorneys, concerning such judgment.

Section 648.10, Florida Statutes, 1941, provides that whenever final judgment has been rendered against any surety company on a fidelity, appearance, supersedeas or surety bond, the surety on said bond shall pay the same within thirty days; that upon notice of failure to pay the amount due under said bond within said time, the insurance commissioner shall retain the bonds or securities deposited with him by said surety company, or so much thereof as may be necessary to pay said judgment and costs, subject to the order of the court trying any suit that may be brought upon said bond.

The purpose of the above statute is to afford ready means for the enforcement and collection of a final judgment against a surety company, by subjecting to sale sufficient securities thereof on deposit with the insurance commissioner to satisfy such judgment, subject to order of the court rendering the judgment. Board of Public Instruction of Dade County vs. Knott, State Treasurer, et al., 143 So. 735. Such a judgment creditor acquires a prior claim to such securities upon notice to the insurance commissioner as required by said Section 648.10. Board of Public Instruction of Dade County vs. Knott, State Treasurer, et al., supra; State vs. Knott, 153 So. 606.

The judgment creditor obtains a prior claim with respect to such securities "only as of the date of the service of the notice." State vs. Knott, 153 So. 606, 608. Such notice, obviously, must be such as to formally notify the insurance commissioner that the judgment has not been paid within the thirty-day period provided by Section 648.10. It would appear that in computing a period "within" which an act is to be performed, the general rule for computation is to exclude the first day and include the last day. Croissant vs. DeSoto Improvement Co., 101 So. 37, 87 Fla. 530. Hence, it would seem that the thirty-day period, provided by said Section 648.10, as applied to the judgment in this case, expired midnight, June 29, 1945. It does not appear that the judgment creditor or his attorneys have served formal notice on you with respect to such judgment after the expiration of such period.

In view of the foregoing, it is my opinion that the above questions are properly answered in the order numbered, as follows:

1. A final judgment obtained by a person against a surety company on a surety bond executed by said company becomes a prior claim upon the securities (i. e. sufficient thereof to pay the judgment) of said surety company deposited with the insurance commissioner when such judgment has not been paid within thirty days of the date it was rendered, and the insurance commissioner has received notice thereof as contemplated by Section 648.10, Florida Statutes, 1941. "Final judgment," as used in said section, is to be construed as a final judgment from which an appeal may be taken.

2. A notice of the rendition of the judgment and that it was unpaid, executed and served upon you prior to the expiration of said thirty-day period, even though such notice is accompanied by the statement that if, at the end of the period, the judgment was paid or otherwise disposed of, you would be notified, is hardly a notice that the judgment has not

been paid within the thirty-day period. It would seem that no notice as required by Section 648.10 has been served upon you, as insurance commissioner, by the judgment creditor or his attorneys subsequent to the expiration of said thirty-day period, and, hence, no notice as required by said law has been served upon you. However, I call your attention to provisions of Section 648.02, Florida Statutes, 1941, and caution you not to release any of the securities of the surety company on deposit with you as long as the aforesaid judgment is outstanding and unsatisfied.

LIMITED SURETY COMPANIES

April 26, 1946.—046-176.

SURETY COMPANY—RELEASE OF DEPOSIT

QUESTION: Where the directors of a limited surety company under Chapter 649, Florida Statutes, 1941, exhibited to the insurance commissioner order of a circuit judge dissolving the corporation and naming the directors trustees to wind up its corporate affairs, and such directors request the insurance commissioner to release and deliver to them the securities deposited with the insurance commissioner under Section 649.06, Florida Statutes, 1941, should the insurance commissioner at this time comply with such request?

To Honorable J. Edwin Larson, Insurance Commissioner:

The chapter and section numbers set forth below refer to Florida Statutes, 1941.

A limited surety company under Chapter 649 is properly incorporated under Chapter 612, Section 649.01. It is required, prior to issuance to it of a certificate, to deposit with the insurance commissioner securities, as described in the law, having a market value of \$5000. Section 649.06.

Whenever such a company ceases to do business in Florida and has settled up all claims which may be chargeable against the deposit in the hands of the commissioner, and has been released from all bonds and undertakings which it has executed as surety or guarantor, said deposit shall be released and delivered by the commissioner to the proper party. Section 649.06. Such required deposit is solely for the use and benefit of obligees of bonds executed by a limited surety company and the person named as beneficiary or obligee in contracts and agreements of guarantyship and suretyship executed by such company. Section 649.07.

No form of procedure is set forth respecting the manner in which the commissioner may ascertain the facts precedent to his right to release and deliver such deposit. It is noted that the wording of Section 649.06 makes it the right and duty of the commissioner to release and deliver said deposit upon the existence of certain facts, as distinguished from an investigation as to facts and an exercise of judgment based upon his findings with respect thereto. It is probable that such an exercise of judgment, based upon an investigation by the commissioner, even though later proved to be erroneous, would fulfill the responsibility of the commissioner under this section so as to relieve him of possible personal liability in the event of such an error. However, until a court has ruled upon what the full measure of the commissioner's duty may be with respect to said deposit, uncertainty will continue to exist.

A corporation under Chapter 612 which is dissolved is continued for the period of three years from date of dissolution for the purpose of prosecuting and defending suits by or against it, to enable it to settle and close its business, dispose of and convey its property, and divide its assets. Section 612.47.

In view of the effect of this section, the purpose for which the deposit is required, and the uncertainty of procedure with respect to release of such deposit by the insurance commissioner, it would seem that as a matter of caution the commissioner should not consider an application for release and delivery of such a deposit until such three-year period has expired.

In view of the foregoing, in my opinion the above question properly is answered as follows:

Ordinary caution recommends that in the absence of specific statutory authority for the exercise of judgment by the insurance with respect to facts which must exist as conditions precedent to the release and delivery of such a deposit to a limited surety company, the insurance commissioner should make no determination with respect to request for release and delivery of such deposit until the expiration of three years from the date such corporation is dissolved in the manner set forth in the applicable provisions of Chapter 612.

CHAPTER XXXII

BANKS AND BANKING

BANKING REGULATIONS

April 24, 1946.—046-172.

UNAUTHORIZED LOAN—LIABILITY OF DIRECTORS

QUESTION: If a bank subject to the provisions of Chapter 23092, Laws of Florida, 1945 (Section 653.18, Florida Statutes, 1941, as amended) and having a combined capital and unimpaired surplus of \$600,000.00 makes to the same person (not an officer, director or employee of such bank) at intervals of one month four separate unsecured loans, the first for \$10,000.00, the second for \$10,000.00, the third for \$20,000.00 and the fourth for an additional \$25,000.00, none of such loans having been approved by the board of directors or a duly authorized committee therefrom, and a total loss is sustained on such loans, are the directors liable under such chapter for (1) \$65,000.00, which is the total amount of the loans, or (2) \$25,000.00, which is the amount of the loan that brought the total of the loans in excess of the limit provided by subsection 2 of Section 1 of such chapter, or (3) \$5,000.00, which is the amount in excess of such limit

To Honorable J. M. Lee, Comptroller:

The applicable provisions of Chapter 23092 are subsections 2, 3 and 4 of Section 1. A consideration of subsections 2 and 3 together indicates that by subsection 2 it is "unlawful to loan more than ten per cent of the combined capital and unimpaired surplus of any bank . . . to any person . . . (not an officer, director, or employee)" unsecured "until it shall have been approved by the board of directors or a duly authorized committee therefrom," and by subsection 4 the directors are made personally liable "for any loss that may be occasioned by any violation of this section." (Emphasis supplied).

There is no decision of the Supreme Court of Florida construing the above subsections in relation to the problem confronting you. I do find that the appellate courts of a few states have interpreted statutes concerned with the same subject but the variance between these statutes and such subsections renders said interpretations of doubtful value here; however, the two federal court cases hereinafter cited are of interest because of their construction of Sections 84 and 93, Title 12, U. S. C. A.

Under Section 84, "The total obligations to any national banking association of any person . . . shall at no time exceed 10 per centum" et cetera, and by Section 93 the directors are personally liable "for all damages . . . sustained in consequence of such violation." (Emphasis supplied).

In *Corsicana Nat. Bank v. Johnson*, 251 U. S. 68, 64, L. ed. 141, the statutory limit was \$20,000.00 and the loan was for \$30,000.00. The question was posed as to whether the entire sum loaned should be treated as damages or only the \$10,000.00 excess above what lawfully might have been loaned should be so regarded. The Court held that

" . . . the entire amount disbursed by the Bank was disbursed in violation of law . . . Hence, the entire excessive loan would have to be regarded as the basis for computing the damages of the Bank."

In *Anderson v. Akers*, 7 F. Supp. 924, the court used as an example separate successive loans made as were those reflected by your question

and ruled that the directors would be liable for the full amount of the last loan. There the court said:

"If any loan of money by the bank to a debtor at the particular time when it is made causes or increases an excess of the total obligations of such debtor to the bank beyond the statutory maximum, all of that loan is illegal."

(1). Under subsection 2 and the facts shown by your inquiry, the bank could loan unsecured to the same person no more than the maximum of \$60,000.00. The first three loans aggregating \$40,000.00 were not in excess of this maximum. This being the case, there was no violation of Section 1 in making such loans and the directors are not personally liable for this loss. It is obvious, then, that, the directors can not be held personally liable for \$65,000.00, the total amount of all loans.

(2) and (3). The conclusion reached in the above federal cases seems logical and reasonable when applied to your question. If such cases are accepted as authority, and in my opinion they should be, the directors would be personally liable, not for \$5,000.00 the amount in excess of the statutory limit, but for \$25,000.00, or the full amount of the final loan that brought the total of the loans in excess of the maximum established by the statute.

But I am not in a position to say that the Supreme Court of Florida will follow the federal cases cited if the question is ever submitted to it. It may be that such court would reach a different conclusion; however, it is my recommendation that until this question has been adjudicated by the Supreme Court of Florida, you should maintain that in a case such as that outlined in your question the personal liability of the directors would be for the entire amount of the final loan that occasioned a violation of subsection 2.

April 5, 1946.—046-310.

STATE FUNDS—F D I C COVERAGE

QUESTION: In the several counties of the State of Florida, certain state funds are payable to and collected by county officers, under applicable statutes, and by such officers at periodical intervals distributed to the State. The result is that in many instances such a county officer has in his account in a bank undistributed state funds and the state treasurer has state funds deposited in the same bank. If the state treasurer has state funds deposited in a bank which is a member of Federal Deposit Insurance Corporation (referred to herein as "Corporation" or "FDIC"), and such a county officer also has an account in said bank in which there are undistributed state funds, would all state funds therein, in the event such bank should close, be combined for the purpose of determining FDIC coverage, or would the state treasurer and local officer be allowed up to \$5000 each on state funds in their respective accounts?

To Honorable J. Edwin Larson, State Treasurer:

Section 653.12, Florida Statutes, 1941, provides, in effect, as related to security of deposits of state funds, that such security shall not be required to the extent that said deposits are under FDIC coverage. With this in mind, the significance of the question is apparent.

Attention is directed to certain subsections of Title 12, Section 264, U.S.C.A.;

Subsection (1) (1) provides, among other things, that "the maximum amount of the insured deposit of any depositor shall be \$5000"; and

Subsection (o) (13) provides, among other things, that "in determining the amount due to any depositor there shall be added together all

deposits in the bank maintained in the same capacity and the same right for his benefit either in his own name or in the name of others"; and

Subsection (m) (3) provides, among other things, that "except as otherwise prescribed by the board of directors, neither the corporation nor such new bank or other insured bank shall be required to recognize as the owner of any portion of a deposit appearing on the records of the bank under a name other than that of the claimant, any person whose name or interest as such owner is not disclosed on the records of such closed bank as part owner of said deposit, if such recognition would increase the aggregate amount of the insured deposits in such closed bank."

With respect to the provisions in said subsection (m) (3) quoted above, it is to be noted that the corporation by its regulations (Section 305.3, Codified Rules and Regulations) has enlarged the provisions of said subsection as follows:

"The owner of any portion of a deposit appearing on the records of a closed bank under the name of a public official, state, county, city, or other political subdivision will be recognized for all purposes of claim for insured deposits to the same extent as if his name and interest were disclosed on the records of the bank: Provided, That the interest of such owner in the deposit is disclosed on the records maintained by such public official, state, county, city or other political subdivision and, Provided further, That such records have been maintained in good faith and in the regular course of business."

Funds officially in the care and custody of the state treasurer are deposited in various banks in Florida under the following circumstances:

(a) All such funds except a comparatively small part thereof, are deposited in said banks to the account of "J. Edwin Larson, State Treasurer," or descriptive words of similar import, without further particularization as to the original source of such funds in said accounts. A large proportion of the total money represented by said deposits derived from state funds received by the state treasurer, the remaining smaller part thereof being comprised of funds held, under the law, by the state treasurer for other than state purposes. Since there is no particularization in connection with these deposits as to the original source of the moneys comprising the deposits in said banks, for the purposes of this question, such deposits must be regarded as composed entirely of state funds.

(b) A comparatively small part of the total of state funds is deposited in certain banks of the state in special accounts designating the source of such funds.

It is apparent from the above provisions of law and the regulation noted that FDIC coverage must be determined by ownership of funds in an insured bank and the right and capacity in which they are there maintained. It will be further noted that reasonably it is not the source of the funds nor the purpose for which they are to be used that determines the amount of such coverage but the ownership and the right and capacity in which such deposits are maintained in such bank.

Thus, in the absence of court construction or apparently feasible reason to the contrary, ordinary caution would seem to require that it be accepted that any funds in deposits in a bank which are owned by the State of Florida, regardless of the source thereof or the purpose for which same were collected, which are held by the state treasurer as state funds for use, in pursuance of appropriation or other applicable law, for state purposes, are funds on deposit which are held by one owner in the same capacity and right.

It would seem that by virtue of the provisions of the above quoted Section 305.3, Codified Rules and Regulations, FDIC, since undistributed

money of the state in the account of the county official constitutes state funds in said account, and such official as a collecting agent always maintains records evidencing the amounts so collected for the state, then such funds obviously are owned by the state in the same capacity and right as are the state funds referred to in paragraphs (a) and (b) above.

In view of the foregoing, it appears that the above question properly is answered as follows:

If the state treasurer has state funds deposited in a bank, and a county officer has money in his account in said bank which under the law has properly been collected by him for the state and is distributable by him to the state, and such bank should close, the state would have FDIC coverage to the total amount of \$5000 with respect to all its funds in said bank, that is to say, such state funds in the account maintained therein by the state treasurer, and undistributed state funds in the account of such county officer.

CHAPTER XXXIII

REAL AND PERSONAL PROPERTY

RECORD OF CONVEYANCES OF REAL ESTATE

July 25, 1945.—045-200.

ADDRESS OF GRANTEE IN DEED

QUESTION: If the clerk of the circuit court should receive a deed on October 2nd to Mr. "C" as grantee, showing his residence as Suwannee county, Florida, would this be sufficient description as provided for in Chapter 23114, Acts of 1945, in order that the clerk should record same?

To Honorable J. L. McMullen, Clerk of the Circuit Court, Suwannee County, Live Oak, Florida:

The statute requires the clerk to:

"ascertain of all persons presenting for public record any instrument other than mortgages conveying or purporting to convey any interest in real estate the correct post office address of the grantee or grantees named in such instrument, and it shall be the duty of the person presenting such instrument for recordation to furnish such information to said official."

I do not consider that Suwannee county, Florida, would be the correct post office address of Mr. "C."

I feel sure that it was the intention of the legislature in the enactment of this law to require such a specific address of the grantee in order that mail addressed to him would, as nearly as possible, be certain of delivery.

In my opinion your question should be answered in the negative.

RECORD OF CONTRACTS; PHOTOGRAPHIC RECORDING

October 30, 1945.—045-343.

DEED—WITHHOLDING FROM RECORD BY CLERK

QUESTION: May the clerk of the circuit court withhold from record a certain deed which is properly witnessed and acknowledged?

To Honorable Ed. Scott, Clerk of the Circuit Court, Collier County, Everglades, Florida:

I answered this fully in my opinion to you of October 8, 1945, in which I stated that it is your duty to record the said deed.

You state in your letter that you recorded a contract and agreement for sale of real estate which was witnessed but not acknowledged as required by Section 696.01, Florida Statutes, 1941. You desire to know if, upon request, it is your duty to expunge the said contract and agreement for sale from your record.

Section 696.01, Florida Statutes, 1941, provides that:

"No contract, agreement, or other instrument purporting to contain an agreement to purchase or sell real estate shall be recorded in the public records of any county in the State of Florida, unless such contract, agreement or other instrument is acknowledged by the vendor in the manner provided by law for

the acknowledgment of deeds; and where there is no acknowledgment on the part of the vendor, the recording officers in the various counties of this state shall refuse to accept such instrument for record."

In the case of *Leatherman v. Schwab*, 124 So. 459, the court there says:

"It was the clerk's duty to refuse to record unproved and unacknowledged sales agreement on its face clearly not entitled to record; clerk having unlawfully recorded unproved and unacknowledged sales agreement not entitled to record, held required to expunge it from the record."

If the said contract and agreement for sale does not meet the requirements as set forth under Section 696.01, Florida Statutes, 1941, then it is your duty upon request to expunge it from your record.

TIMBER AND LUMBER ADRIFT

August 23, 1945.—045-257.

OWNERSHIP; SALE, ETC.

QUESTION: Have the Trustees of the Internal Improvement Fund authority to claim and sell logs and timber adrift, without visible evidence of ownership, upon the various waters of the state?

To Honorable Nathan Mayo, Commissioner of Agriculture:

A search of our statutes does not reveal that the trustees acquire any property rights in such logs and timber.

For your information, briefly, the law upon the subject of such driftage is as follows:

Chapter 706, Florida Statutes, 1941, deals in part with timber and lumber adrift and provides for the appointment of a public custodian therefor in each port of the state, who upon recovery, shall give public notice that he has found such timber or lumber before he may sell the same. His jurisdiction is restricted to the port whereat he was appointed. If there is no such official, no person other than the owner or his agents shall take possession of any lumber in rafts, hewed timber, logs or spars adrift. If the same have passed out into the open sea or bays, any person finding them shall secure the same and advertise them at the door of the courthouse of the county wherein the rafts, timber, logs or spars were found. Whoever finds timber or lumber adrift, outside of the aforementioned ports, and sells it without complying with the law, or disposes of it as his timber, or appropriates it to his own use, shall be deemed guilty of larceny.

Section 536.13 provides for a stamp or brand of logs for anyone in the business of getting out, buying, selling or manufacturing logs.

Section 536.18 states that if any person shall fraudulently alter, change or deface such mark, stamp or brand, or shall fraudulently mark, stamp or brand any unmarked, unstamped or unbranded lumber, logs or timbers, with the intention to claim the same or to prevent identification, he shall be punished as if he had committed larceny.

Section 811.07 asserts that whoever commits larceny by stealing any log or logs or timber, the property of another, of less than one hundred dollars in value, he shall be punished by imprisonment in the state prison not exceeding two years or by fine not exceeding five hundred dollars.

Generally, in the absence of abandonment, the owner of logs and timbers which have escaped from control may pursue and recover them, or their value, from persons into whose hands they may have fallen, as a finder acquires no right to their possession. It follows that a person, other than the above public official, finding and taking possession of and selling floating or stranded logs and timbers is also liable for conversion.

CHAPTER XXXIV

ESTATES OF DECEDENTS

FLORIDA PROBATE LAW

August 19, 1946.—046-347.

CHAPTER 22767—REPEAL

QUESTION: Was Chapter 22767, Laws of Florida, Acts of 1945, which amended Section 732.05, Florida Statutes, 1941, repealed by Chapter 22783, Laws of Florida, Acts of 1945, which was a general revision of the probate laws of this state, including said Section 732.05?

To Honorable William C. Brooker, County Judge, Hillsborough County, Tampa, Florida:

Chapter 22767 became a law on May 30, 1945, and took effect on October 1, 1945, and Chapter 22783 became a law on May 31, 1945, and took effect on the same day. In other words, Chapter 22783 is the later act. Attention is called, however, to Section 6 of said Chapter 22783, which provides in part that "laws passed at this regular session of the legislature of 1945, shall not be repealed or affected by this revision act, but shall have full effect, as if passed after the enactment of this act."

The above provision in Section 6 of Chapter 22783 is substantially identical with a similar provision contained in prior laws of this state adopting statutes (see Section 1, Chapter 4055; Section 1, Chapter 5372; Section 4, Chapter 7838; Section 4, Chapter 20719; Section 4, Chapter 22000 and Section 4, Chapter 22858, Laws of 1891, 1905, 1919, 1941, 1943 and 1945). In the light of the provision above quoted, contained in Section 6 of Chapter 22783, I am of the opinion that Chapter 22767 controls over similar provisions in Chapter 22783, and that Section 732.05, as contained in the 1945 Cumulative Supplement, is correct.

October 11, 1946.—046-432.

DISQUALIFICATION OF JUDGE—REASONS

QUESTION: What reasons are considered legally sufficient for a county judge to disqualify himself in the probate of a will?

To Honorable R. M. Witherspoon, County Judge, Franklin County, Apalachicola, Florida:

Section 732.04, Florida Statutes, 1941, says:

"The county judge shall be disqualified for interest in all instances in which judges generally are so disqualified and also in estates in which he is an heir of the decedent or is a legatee, devisee, trustee or executor under the will, or a witness thereto."

As to the disqualification of judges generally, I would refer you to Section 38.02, Florida Statutes, 1941.

I would further call your attention to the case of *McGregor v. Hammock*, 132 So. 815, wherein the court there says:

"... a judge should decline to officiate in a case where the judge is conscious of any bias or prejudice which might influence his official action against any party to the litigation, whether challenged or not. Judicial ermine should be zealously guarded, that it may not become the object of scorn nor warrant suspicion."

CHAPTER XXXV

DOMESTIC RELATIONS

HUSBAND AND WIFE

October 28, 1946.—046-457.

APPLICATION FOR LICENSE—POSTING

QUESTION: Can a county judge withhold publication of applications for marriage licenses until the licenses have actually been issued?

To Honorable W. F. Blanton, County Judge, Dade County, Miami, Florida:

Section 741.04, Florida Statutes, 1941, as amended by the 1943 law says:

"... It shall be the duty of the county judge to post a true copy of said application at the front door of the court house in the county where said application was made for a period of three days prior to the issuance of said marriage license."

It is my opinion that under this law you must post a true copy of said application three days prior to the issuance of said license.

I am not unmindful that this might cause the parties to the application some annoyance by photographers and notaries public but I feel sure that the benefits of the law will outweigh such annoyances.

November 14, 1946.—046-466.

MARRIAGE LICENSES—CEREMONY

QUESTION: A marriage license has been issued to a man and woman, a marriage was solemnized, and afterwards the parties desire another marriage to be solemnized. Should a new license be issued for the second marriage?

To Honorable William C. Brooker, County Judge, Hillsborough County, Tampa, Florida:

Section 741.08, Florida Statutes, 1941, says:

"Before any of the persons named in Section 741.07 shall solemnize any marriage, he shall require of the parties a marriage license issued according to the requirements of Section 741.01, and within ten days after solemnizing the marriage he shall make a certificate thereof of the license, and shall transmit the same to the office of the county judge from which it issued."

In my opinion, when a legal marriage license has been issued to a couple that couple may have any number of marriage ceremonies conducted thereon without the necessity of their obtaining a new license for each ceremony.

December 18, 1946.—046-505.

MARRIAGE LICENSE APPLICATIONS—PUBLIC NOTICE

QUESTION: Applications for marriage licenses have been made agreeable to Section 741.04, Florida Statutes, 1941, as amended by the laws of 1945; a true copy is posted as required in said section. Are these

applications such public records that they must be open for personal inspection to any citizen of Florida between the time the application is made and the license issued?

To Honorable W. F. Blanton, County Judge, Dade County, Miami, Florida:

In my opinion, these applications are public records and are open to examinations by citizens as set forth in Section 119.01, Florida Statutes, 1941. Therefore, you have no authority to deny any citizen of Florida access to such applications.

I recognize the fact that, as you say, furniture dealers, photographers, notaries public, and others, are annoying the applicants, but this is a matter which is to be regretted.

December 4, 1946.—046-504.

LICENSE TO MARRY—MINOR—CONSENT OF PARENTS

QUESTION: Worth V. Littell, student at the University of Tampa, a legal resident of Florida, and whose address is Aripeka, Florida, and Kathleen Philomena Martin have applied for marriage license. Kathleen has just come from Ireland on a British Passport #LO 32601 issued July 4, 1946.

This passport contains her photograph, unquestionably that of the applicant, and shows her birth date April 16, 1927. Thus she is less than twenty-one years of age. However, the passport contains the following statement:

"Holder states that she is proceeding to the United States of America for the purpose of marriage. This passport ceases to be valid after the marriage has taken place and should be surrendered to the nearest British Consular Officer."

with the stamp of the foreign office, Liverpool, thereon, dated July 4, 1946.

I am told by this young lady that her parents had to give consent before the visa would issue.

In your opinion, am I authorized under the law to issue a license without further proof of authority of the parents? The parties have made application for license today and have published notice of intention to marry on Friday of this week.

To Honorable William C. Brooker, County Judge, Hillsborough County, Tampa, Florida:

I assume that both parents of such minor are not deceased and she has not been before married.

Section 741.04, Florida Statutes, 1941, as amended, is very clear and prohibits you from issuing a license "unless there shall be first presented and filed with him (you) a written consent of the parent or guardian of such minor to such marriage, acknowledged before some officer authorized by law to take acknowledgements and administer oaths," as long as such minor remains un-enfranchised and laboring under the disabilities of non-age.

Therefore, in my opinion, you are not authorized to issue the license until the above law has been complied with.

December 21, 1946.—046-522.

MINOR—REMOVAL OF DISABILITIES—CONSENT

QUESTION: Section 741.04, Florida Statutes, 1941, as amended by the laws of 1945, requires as a condition precedent to the issuance of a

marriage license by the county judge to a minor that there shall be first presented and filed with him the written consent of the parents or guardian of such minor to such marriage, acknowledged before some officer authorized by law to take acknowledgements and administer oaths. Is a minor who has had his disabilities removed as provided by Sections 62.23, -24, -25, -26, required to file with the judge such written consent?

To Honorable William C. Brooker, County Judge, Hillsborough County, Tampa, Florida:

There is no doubt that it was the intention of the legislature in enacting said Section 741.04 to prohibit the indiscriminate marriage of children who do not have the requisite experience and maturity of thought to enter into the marriage relation.

There is no doubt that it was the intention of the legislature in enacting said Sections 62.23 to 62.26, both inclusive, to hold that a judge of the circuit court after a careful consideration can upon a petition by a guardian of a minor over eighteen years of age remove the disabilities of such minor and thus give to the minor the authority to assume the management and control of his estate, to contract and be contracted with, to sue and be sued, and to do and perform any and all acts, matters and things that he could do if he were twenty-one years of age. Thus, in effect, holding that the minor has the requisite experience, mental ability, etc., as if he were twenty-one years of age.

It will be noticed that the consent for the marriage license is to be made by the parents or guardian of such minor and that the petition for the removal of disabilities must be filed by the guardian.

I, therefore, answer your question in the negative.

May 21, 1945.—045-114.

MARRIAGE LICENSES—APPLICATIONS, ETC.

QUESTIONS: 1. Can either party to the contract go before a notary in another state, or other county in this state, and send notarized application to the county judge, to be filed with applications for marriage licenses, and should the same be posted on a bulletin board?

2. Is there any specific privilege to soldiers who happen to be in the county on short leave of absence, or will they be compelled to wait the specified three days?

To Honorable Hiram W. Bryant, County Judge, Fort Myers, Florida:

1. I do not find any law requiring that the application be notarized, but the application must be posted as required by the act.

Regarding the computation of time of which you inquire, I hand you herein, this day prepared by me, an opinion which covers this point.

2. I find no exceptions in the law for soldiers.

May 21, 1945.—045-116.

MARRIAGE LICENSES; ISSUANCE—COMPUTATION OF TIME

QUESTION: How would the time be computed as set forth in the act amending Section 741.04, Florida Statutes, 1941, relating to the issuance of marriage licenses in the State of Florida?

To Honorable T. J. Jennings, Jr., County Judge, Green Cove Springs, Florida:

To Honorable H. H. McDonald, County Judge, Gainesville, Florida:

It is provided in said act, "No marriage license shall be issued by any county judge in this state until after the expiration of three days from the date application is made to a county judge. . . ."

"A day begins at midnight and ends the following midnight." *Miss. Ben. Association vs. Brooks*, 185 So., 569 Miss.; *McKinnon v. City of Birmingham*, 71 So. 463, Ala.

"... in construing a contract or a statute, where the computation of time is to be made from a specific day, and not from the occurrence of an event on that day then the first day must be excluded. The word 'from' excludes the day of date."

See *New York Life Ins. Co. v. Bullock*, 26 F. 2d 667. Citing: *Best v. Polk*, 18 Wall. 112, 21 L. Ed. 805. *Dutcher v. Wright*, 94 U. S., 553, 24 L. Ed. 130. To like effect: *Hodges, State Shell Fish Commissioner v. Filstrup*, 114 So. 521, Fla.

In my opinion three full days must pass from the date application is made. For example, if application is made to you any time Monday, that is, after twelve o'clock midnight Sunday until midnight Monday, then the earliest moment that you can issue the license will be after twelve o'clock midnight Thursday. The act further provides that:

"... it shall be the duty of the county judge to post a true copy of said application at the front door of the court house in the county where said application was made for a period of three days prior to the issuance of said marriage license."

In the case of *Jacksonville Land Holding Co. v. American Oil Co.*, 188 So. 809-811, the court holds:

"If a notice is required to be given a stated number of days prior to a day to be specified that time should be computed counting and including the day notice is given and excluding the specified day of performance."

That is, using the example above set forth, if you had issued the marriage license on Friday you were compelled to post the notice not later than midnight Tuesday.

I am not unmindful of the rules enunciated by our supreme court in computing time, wherein Sundays and holidays are concerned, but, in my opinion, these are not applicable to this act. It was the intention of the legislature, I am sure, when it passed the act, that the three days which must intervene between the application for the license and the issuance thereof was time for the parties seeking the said license to meditate upon and consider the intended marriage, and, no doubt, in many cases, to "sober up." I know of no better day than Sunday in which to do these things. There would be no reason or sense in considering Sundays or holidays, in connection with this act, as other than any other days.

July 30, 1945.—045-213.

MARRIAGE LICENSES—ISSUANCE, ETC.

QUESTIONS: 1. A license will be duly issued by the county judge prior to October 1, 1945, in conformity with Chapter 22643, Acts of 1945, and the parties expect to be married after October 1, 1945. Can they do so without violating Section 12 of Chapter 22738, Acts of 1945?

2. Can a county judge take applications for marriage licenses after September 26, 1945, under Chapter 22643 without requiring the compliance with Chapter 22738, which goes into effect October 1, 1945?

To Honorable W. F. Blanton, County Judge, Dade County, Miami, Florida:

Section 12 of the said Chapter 22738 provides:

"From and after October 1, 1945, any person who enters into the contract of marriage **without having first complied with this act** shall be guilty of a misdemeanor . . ." (Emphasis supplied).

Section 1 of said Chapter 22738 provides:

"That every person making application for license to marry shall file with the county judge, as a condition precedent to the issuance of any such license, a certificate from a duly licensed physician . . ."

Inasmuch as you duly issued the license prior to October 1, 1945, when it was not necessary, as a condition precedent to the issuance thereof, that a certificate be filed and it was not then necessary to comply with the said Chapter 22738, the parties holding such a license from you could marry after October 1, 1945, without committing a crime.

Section 10 of Chapter 22738 provides:

"... any county judge . . . who shall issue a marriage license without having received the physician's certificate, laboratory report or order from the court, or who shall have reason to believe that any of the facts have been misrepresented and shall nevertheless issue a marriage license . . . shall be guilty of a misdemeanor."

Section 15 of said act provides:

"This act shall take effect October 1, 1945."

It is my opinion that you must require the compliance with said Chapter 22738 if you issue the marriage license after October 1, 1945.

September 10, 1945.—045-283.

WITNESSES TO MARRIAGE—NAMES ON LICENSE

QUESTION: Where a marriage is performed by a justice of the peace, is it necessary that the names of two witnesses appear on a marriage license before it is recorded by the county judge who issued the license?

To Honorable Thomas Green, Justice of the Peace, Cross City, Florida:

You state that you performed a marriage ceremony and in accordance with Section 741.08, Florida Statutes, 1941, within ten days after solemnizing the marriage you made a certificate thereof of the license and transmitted same to the office of the county judge from which it issued. The county judge informed you that the names of two witnesses must appear on the marriage license before he could record it.

Section 741.08, Florida Statutes, 1941, says:

"Before any of the persons named in §741.07 shall solemnize any marriage, he shall require of the parties a marriage license issued according to the requirements of §741.01, and within ten days after solemnizing the marriage he shall make a certificate thereof of the license, and shall transmit the same to the office of the county judge from which it issued."

There is no requirement therein that the names of two witnesses appear on the marriage license, and I do not find where this law has been changed.

As a practical matter in view of Section 741.10, Florida Statutes, 1941, which reads as follows:

"When any marriage is or has been solemnized by any of the persons named in §741.07, and such person has not made a certificate thereof of the marriage license as required by §741.08, or when the marriage license has been lost, or when by reason of death or other cause the proper certificate cannot be obtained, the marriage may be proved by affidavit before any officer authorized to administer oaths made by two competent witnesses who were present and saw the marriage ceremony performed which affidavit may be filed and recorded in the office of the county judge from which the marriage license issued, with the same force and effect as in cases in which the proper certificate has been made, returned and recorded."

I think it would be wise to always solemnize marriages in the presence of two witnesses so that the proof of marriage might be made, where, for any reason, a certificate is not available.

December 5, 1945.—045-363.

MARRIAGE BETWEEN FILIPINOS AND WHITE PERSONS

QUESTION: Is the county judge authorized to issue marriage licenses between Filipinos and white persons?

To Honorable W. F. Blanton, County Judge, Dade County, Miami, Florida:

Section 24 of Article XVI of the Constitution of Florida provides:

"All marriages between a white person and a negro, or between a white person and a person of negro descent to the fourth generation, inclusive, are hereby forever prohibited."

Section 741.12, Florida Statutes, 1941, provides that if any white man shall intermarry with a negro, or if any white woman shall intermarry with a negro, either or both persons to such marriage shall be punished by imprisonment in the state prison not exceeding ten years, or by fine not exceeding one thousand dollars.

Section 741.14, Florida Statutes, 1941, makes it unlawful for a county judge to knowingly and wilfully issue a marriage license for a white person to marry a negro.

Section 741.16, Florida Statutes, 1941, makes it unlawful to solemnize such a marriage.

Section 1.01, Florida Statutes, 1941, provides: "The words 'negro,' 'colored,' 'colored persons,' 'mulatto' or 'persons of color,' when applied to persons, include every person having one-eighth or more of African or negro blood."

It is difficult to fix the race of any particular group because many groups are of mixed blood. Because of this it is difficult to define with certainty to what race every Filipino belongs. (*In re Knight*, 171 Fed. 299; *In re Rallos*, 241 Fed. 686; *Roldman v. Los Angeles County* (Cal.) 18 Pac. 2d. 706.)

In the ordinary sense of the term a Filipino is not a white person and is not of African nativity or descent (*In re Mallari*, 239 Fed. 416). He has been by one authority classified as a Malay (*Roldman v. Los Angeles County*, *supra*).

"In the absence of statute, marriages between persons of different races is permissible and lawful." (35 Am. Jur. *Miscegenation*, Section 146, page 268).

The statute, as shown above, prohibits and makes it unlawful for a county judge to knowingly and wilfully issue a marriage license for a white person to marry a negro.

A negro is "a black man descended from the black race of South Africa." (*Felix v. State*, 18 Ala. 720).

In my opinion it is not unlawful for you to issue a marriage license for a white person to marry a Filipino, provided that Filipino does not have one-eighth or more of African or negro blood.

May 15, 1946.—046-204.

MARRIAGE LICENSE—AGE LIMITS

QUESTION: Is Section 741.06 relating to the issuance of marriage licenses to males under eighteen years of age and females under sixteen in full force and effect, or was it repealed by Chapter 22643, Acts of 1945?

To Honorable William C. Brooker, County Judge, Hillsborough County, Tampa, Florida:

In my opinion, these sections when read together show no conflict. Chapter 22643 does not specifically repeal Section 741.06, and there is no repeal by implication. Both laws can and should be read together.

June 1, 1946.—046-239.

MARRIAGE LICENSE—MINORS—CONSENT OF PARENTS

QUESTION: In issuing marriage licenses to minors under 21 years of age, do both parents have to give their written consent to such marriage?

To Honorable William C. Brooker, County Judge, Hillsborough County, Tampa, Florida:

Section 741.04, Florida Statutes, 1941, requires the written consent of the parents. This section was derived from Compiled General Laws, 1927, Sections 5848 and 5850. Said Section 5848 required the consent of the parent, while Section 5850 required the consent of the parents. The compilers of the Florida Statutes, 1941, combined the said Sections 5848 and 5850 into one section, 741.04, and retained the requirement of the written consent "of the parents."

If the parents of the minor are living together, and thus in effect the minor is in custody of both parents, or if divorced and the joint custody of the minor is given to both parents (Chapter 744, Florida Statutes, 1941, as amended in 1945), it would be necessary to require the written consent of both parents.

The Honorable George Couper Gibbs, former attorney general, on May 29, 1939, ruled that in case the parents of the said minor are divorced and the custody and control of the minor is given to one parent, then only the parent having custody and control of the minor should be required to give the written consent. I concur in this opinion. Of course, needless to say, if one parent is dead, only the consent of the living parent, in whose custody the minor is, should be obtained.

January 1, 1945.—045-4.

MARRIAGE OF A GIRL THIRTEEN YEARS OF AGE—VALIDITY

QUESTION: Is the Florida marriage of a girl thirteen years of age, performed by a minister on the authority of a marriage license obtained

by the minister (the girl then claiming to be seventeen years of age), a valid marriage?

To Honorable C. H. Whorral, U. S. Department of Justice, West Palm Beach, Florida:

You state that the husband is a native and citizen of the Bahamas and the girl wishes to bring her husband to this country. You also state in your letter, that during the investigation, the girl stated that her mother and stepfather consented to the marriage.

Section 741.06, Florida Statutes, 1941, prohibits the granting of a marriage license when the female is under the age of sixteen years, regardless of the consent of the parents, unless the parties to the proposed marriage acknowledge under oath that they are the parents, or expectant parents, of a child, in which event the county judge may use his discretion as to whether or not he will issue the license. Accordingly, as the girl in this case was thirteen years of age, the marriage license would not have been a valid license, unless the parties made the acknowledgment under oath required by the statute. If they made such oath and a license was issued, it would be a valid license, assuming there were no other impediments.

The marriage would not necessarily be invalid even if they had not made such acknowledgment under oath. Under the laws of this state, failure to comply with statutory requirements as to license, oaths, consent of parents, etc., does not necessarily invalidate the marriage. The parties may have contracted a common law marriage, which is as valid in this state as a statutory marriage. Under the common law, the age of consent for the female is twelve years, and that law has been adopted in this state. *Green vs. Green*, 80 So. 739. As the girl was thirteen years of age, she had the requisite capacity under the common law to make a valid marriage. The only requisites for a common law marriage are capacity of the parties to enter into the marriage contract and their agreement to become husband and wife immediately at the time the mutual consent is given. This consent must be given at the same time and in the presence of each other. If those conditions were fulfilled in this case, the marriage would be valid.

BASTARDY

November 8, 1945.—045-350.

TRIAL JURISDICTION—DUTY OF PROSECUTING ATTORNEY

QUESTIONS: 1. Where a defendant in bastardy proceedings is bound over for trial under Chapter 742, Florida Statutes, 1941, is it the duty of the prosecuting attorney of the court in which the trial is to be held, to prosecute the proceedings against the defendant?

2. Does trial jurisdiction in a bastardy proceeding brought in Pasco county lie in the circuit court of said county or in the court of record of said county, which was established by Chapter 22837, Acts of 1945?

To Honorable Thompson H. Getzen, County Solicitor, Dade City, Florida:

When a defendant in bastardy proceedings is bound over and the case reaches the trial court, it loses its criminal aspect and is thenceforth a civil action between the prosecutrix and the defendant. *Edmond, N. E. v. State ex rel Lulu E.*, 6 So. 58. In the case of *State v. Rowe*, 128 So. 7, the Supreme Court of Florida said:

"This court has repeatedly held that proceedings in bastardy, though quasi-criminal in their inception, become civil cases when they reach the circuit court."

Since the bastardy proceeding becomes a civil action between the prosecutrix and the defendant after the defendant is bound over and the proceeding reaches the trial court, it is my opinion that it is not the duty of the prosecuting attorney of the trial court to handle the case in such court against the defendant.

2. As to whether trial jurisdiction in bastardy cases is vested in the circuit court or in the court of record of Pasco county, this is a judicial question which must be settled by the court, and I therefore refrain from expressing an opinion thereon.

GUARDIAN AND WARD

May 3, 1946.—046-225.

ENDORSEMENT OF STATE WARRANTS—EVIDENCE OF AUTHORITY

QUESTIONS: 1. Under what circumstances, if any, may a state warrant be endorsed by a person other than the payee for such payee?

2. How should the guardian of a person named as payee in a state warrant endorse the same? What evidence of the authority of such guardian is required?

3. Welfare warrants endorsed by a person by his mark must bear the signatures and addresses of two witnesses. Should a warrant be accepted which has (a) the signatures of such witnesses but not addresses; or (b) one witness only?

4. May a person not a payee properly endorse a state warrant for deposit to the account of the payee?

5. May the parent of a payee who is a minor endorse a state warrant for the payee?

6. What is the proper method for endorsement of a warrant made payable to a partnership or trade name of an individual?

7. What is the effect of the endorsement of a bank guaranteeing all prior endorsements in a state warrant?

To Honorable J. Edwin Larson, State Treasurer:

Your questions are answered in their numbered order as follows:

(1) A state warrant may be endorsed for the payee by a person other than the payee in the following instances:

(a) When endorsed by a person other than the payee for deposit to the bank account of the payee, subject to the condition set forth in the answer to question 4.

(b) When endorsed by a parent or parents under the circumstances set forth in paragraph 5 hereof.

(c) When endorsed in a representative capacity as a guardian, administrator, executor, trustee, or other agent.

(2) A state warrant made payable to a person who has a guardian should be endorsed for such person by the guardian in his representative capacity. If such warrant is payable to the guardian, the guardian should endorse it in the representative capacity as set forth in the warrant. It would seem proper that in all instances when a state warrant is endorsed by a person in his representative capacity as guardian, executor, administrator, trustee or in any capacity under court appointment, that there should be delivered to the state treasurer certified copy of the appropriate order evidencing such appointment.

(3) It seems that welfare warrants have printed instructions thereon requiring that in instances where the payee named therein endorses his name thereon by his mark that such endorsement must be witnessed by the signatures and addresses of two witnesses. Welfare warrants, as well as all other warrants, of the state presented to the treasurer for payment should be endorsed in every particular as required by the printed instructions thereon. Therefore, it would seem improper for the state treasurer to accept a welfare warrant which has not been endorsed and which does not have thereon the names and addresses of the witnesses to such endorsement as required by the printed instructions on the warrant. The omission of one witness or the omission of the address or addresses of the two required witnesses are sufficient causes for the refusal of the treasurer to accept any such warrant under the circumstances related.

(4) In the absence of printed instructions on the warrant with respect to the formalities to be observed in the endorsement of the warrant, it would seem that a person not a payee properly may endorse a state warrant for deposit to the bank account of the payee.

(5) Under amended Section 744.13 as the same appears in Section 1 of Chapter 22750, Laws of Florida, Acts of 1945, the mother and father jointly, or the survivor, may, without appointment, authority or bond, collect, receive, manage and dispose of any personal property inherited by or otherwise accruing to the benefit of a child during infancy when the amount involved in any instance does not exceed \$500.00; provided that in personal injury or tort claims, their power to compromise or accept settlement is limited to claims not in excess of \$100.00. It is my construction of this section that a warrant payable to an infant may be endorsed for him by his parents jointly or the surviving one of them, provided the warrant is not in excess of \$500.00.

(6) A warrant made payable to a partnership should be endorsed in the name of the partnership by a partner or some other authorized agent, the person endorsing the same to indicate in what capacity he endorses. A warrant made payable to a business operated under a trade name and owned by an individual is properly endorsed in such name by the individual operating it or by some authorized agent of the individual so operating such business. In each instance the person actually endorsing the warrant should indicate his connection with the business for which he endorses. It would appear that if all prior endorsements are guaranteed by the accepting bank that, both as to partnerships and individuals operating under a trade name, the endorsements of such warrants as aforesaid should be accepted by the state treasurer.

(7) With respect to this question, it seems proper to digress momentarily to consider the nature of a state warrant. If a state warrant is a negotiable instrument, a bank endorsement thereon that "all prior endorsements guaranteed," or words of similar import, is a guarantee by such bank that all previous endorsements are genuine and, among other things, that the instrument at the time of endorsement is valid and subsisting. Sections 674.67 and 674.68, Florida Statutes, 1941; State vs. Merchants National Bank of St. Paul, et al., 145 Minn. 322, 177 N. W. 333. However, there is respectable authority that a state warrant is not a negotiable instrument. Mills, etc., National Bank vs. Herald, 74 Cal. 603, 16 P. 507; First National Bank vs. Olsness, 48 N. D. 758, 186 N. W. 751; Logan County Bank vs. Farmers National Bank of Oklahoma City, 55 Okla. 952; 155 P. 561.

If a state warrant is non-negotiable, while the authorities are far from uniform, the better rule seems to be that the endorsement of such an instrument renders the endorser liable to his endorsee. And where an endorser of such an instrument accompanies the endorsement with an express agreement, the great weight of authority is that he is liable to

his endorsee according to his agreement. Annotation, 79 A. L. R. 742.

Thus, it would seem that when a bank accompanies its endorsement with the words, "all prior endorsements guaranteed," it renders itself liable for forged or unauthorized endorsements preceding its own, whether the instrument is negotiable or non-negotiable. However, such a bank endorsement should not be accepted as removing the necessity of refusal to accept a warrant obviously not properly endorsed.

December 12, 1946.—046-503.

INCOMPETENTS—SERVICE THEREON

QUESTION: A man was adjudicated an incompetent and committed to the Florida State Hospital, thus placing him in the custody of the superintendent thereof. Later this person was released from the state hospital and placed in the custody of his wife who took him to Chicago, Illinois and placed him in the custody of his brother. Does the guardianship of the person of the said incompetent continue in the said superintendent of the state hospital so that service of notices as required by Chapter 22750, Acts of 1945, may be effected?

To Honorable William C. Brooker, County Judge, Hillsborough County, Tampa, Florida:

Section 1 of said Chapter 22750, says:

"Whenever it is necessary to make service upon an incompetent, the notice or citation shall be served upon such incompetent and also on the person in whose care and custody such incompetent may be."

It is my opinion that the guardianship of the said incompetent does not continue in the superintendent of the Florida State Hospital so that service of such notices may be had as stated.

CHAPTER XXXVI

CRIMES

OBSTRUCTING JUSTICE

December 28, 1946.—046-525.

MUNICIPAL BOND—FORFEITURE—PROSECUTION

QUESTION: Where a person forfeits a bail bond posted to secure his appearance in a municipal court to answer a charge of violating a municipal ordinance, does such forfeiture render such person subject to prosecution under Section 843.15, Florida Statutes 1941?

To Honorable Chester B. McMullen, State Attorney, Clearwater, Florida:

Section 843.15, Florida Statutes 1941, provides that any person who is charged with the commission of a criminal offense, and who has entered into a bail bond conditioned upon his appearance before any court in this state, shall be guilty of a misdemeanor if he forfeits such bail bond by not appearing in court at the time and place specified in the bond.

A person cannot be prosecuted under said statute unless such person has forfeited a bail bond made by him in consequence of his having been charged with a "criminal offense."

It is my view that, within the meaning of said statute, a "criminal offense" is an offense against the state, not an offense against a municipality. See the definition of "Criminal Offense" in 22 C. J. S. 52.

I think that the words "criminal offense," as used in said statute, have the same meaning as the word "crime," and, in construing Section 90.08, Florida Statutes 1941, which makes it permissible to prove that a witness has been convicted of a crime, the Supreme Court of Florida has ruled that a conviction for violation of a municipal ordinance cannot be proved against a witness because it is not a crime within the meaning of said statute. *Roe v. State*, 119 So. 118.

Since a person who is charged with the violation of a municipal ordinance is not charged with a criminal offense, or crime, against the state, it is my opinion that he cannot be prosecuted under Section 843.15 for forfeiting a bail bond made by him to answer such charge.

GAMBLING

May 20, 1946.—046-211.

PUNCH BOARDS—LEGALITY

QUESTION: Are punch boards paying off in merchandise legal, and is there any such thing as a legal punch board?

To Mrs. M. W. Baldree, Sheriff, Sumter County, Bushnell, Florida:

If the board is used for gambling or as a game of chance, it is a gambling device and is illegal (see Sections 849.11, 205.21 and 849.01, Florida Statutes, 1941).

As to whether there is such a thing as a legal punch board, it might be possible to conceive of such a board, but ordinarily they are not used in a legal manner.

July 18, 1946.—046-308.

PUNCHBOARDS—LEGALITY

QUESTION: Where the persons punching certain numbers on a punch board receive money as prizes, what charge can be placed against the operator of the punch board?

To Honorable John H. Shuman, County Prosecuting Attorney, Monticello, Florida:

Section 849.01, Florida Statutes, 1941, provides that whoever keeps, exercises or maintains gambling implements or apparatus, or a house or other place, for the purpose of gambling, or in any place of which he may have charge, control or management, suffers or permits any person to play for money at any game whatever, shall be punished as provided in said section.

In my opinion a person who operates a punchboard in his place of business and pays money as prizes to the persons who punch certain numbers, is keeping and maintaining gambling implements and apparatus for the purpose of gambling, and is also suffering and permitting people to play for money at a game, in a place of which he has charge, control and management. Therefore, I am of the opinion that such a person may be prosecuted under Section 849.01.

Section 849.11, Florida Statutes, 1941, provides that whoever sets up or promotes any game of chance by lot or with dice, cards, numbers, hazards, or any other gambling device whatever for, or for the disposal of, money or other things of value, shall be punished as therein provided. It is my opinion that a punchboard for the disposal of money to the persons punching the winning numbers is a gambling device within the meaning of this statute, and that the person who sets up or promotes play on such a punchboard is subject to prosecution thereunder.

March 1, 1945.—045-89.

PUNCHBOARDS OFFERING CIGARETTES AS PRIZES

QUESTION: What charge should be placed against operators and distributors of punchboards on which cigarettes are offered as prizes?

To Honorable R. R. Robinson, Constable, Sumter County, Wildwood, Florida:

Section 849.01, Florida Statutes, 1941, provides that whoever, in any place of which he may have charge, control or management, procures, suffers or permits any person to play for money or other valuable thing, at any game whatever, shall be guilty of a felony. It is my opinion that the person having charge of the place in which the punchboard is located, and who permits people to play for cigarettes on such punchboard, can be prosecuted under this statute.

Section 849.11, Florida Statutes, 1941, provides that whoever sets up or promotes any game of chance by lot or with dice, cards, numbers, hazards, or any other gambling device whatever, for money, or for the disposal of money or other thing of value, shall be guilty of a misdemeanor. It is my opinion that any person who sets up a punchboard on which cigarettes are offered as prizes and who promotes play on such punchboard, may be prosecuted under this statute.

I am aware of no criminal statute under which the distributor of such a punchboard might be prosecuted unless you are able to prove such facts as would justify any support a charge of being an accessory to the felony denounced by said Section 849.01 or a principal to the misdemeanor dealt with in said Section 849.11.

March 28, 1946.—046-116.

SERVICE ORGANIZATIONS—LOTTERIES

QUESTION: Do the state lottery laws affect the American Legion and the Veterans of Foreign Wars?

To Honorable Wilbur F. Osburn, County Judge, Okaloosa County, Crestview, Florida:

The state lottery laws affect all alike. I know of no law giving the American Legion or Veterans of Foreign Wars any immunity therefrom.

OFFENCES BY AUCTIONEERS, PUBLIC OFFICERS AND EMPLOYEES

May 23, 1946.—046-215.

BOARD MEMBER AS EMPLOYEE—LEGALITY

QUESTION: Has the Florida State Board of Examiners for Nurses authority to employ a member of said board to act as license investigator and pay her a salary?

To Miss Kathryn R. Gutwald, R. N. Secretary-Treasurer, State Board of Examiners for Nurses, West Palm Beach, Florida:

In connection with another matter I have had occasion to review my opinion of December 12, 1941, rendered to Mrs. Louisa B. Benham, executive secretary-treasurer of the State Board of Examiners for Nurses. After careful reconsideration, it is my opinion that my answer to Question Number 1 therein was incorrect. (See Report of the Attorney General, 1941-42, P. 636)

The question should be answered in the negative and this opinion rescinds my former opinion in response to that question.

The obligations of public officers as trustees for the public are established as a part of the common law, fixed by the habits and customs of the people. Every public officer is bound to perform the duties of his office honestly, faithfully and to the best of his ability, in such a manner as to be above suspicion of irregularities, and to act primarily for the benefit of the public, 43 Am. Jur. 77, 78.

Predicated upon this principle, the majority rule is that a contract entered into by a public board with one of its own members is against public policy, so is void, or at least voidable, even in the absence of a statutory prohibition. 43 Am. Jur. 106; 3 L. R. A. (N. S.) 849; Ann. Cas. 1912D 659.

This rule has been incorporated in the statute law of Florida with respect to certain types of contracts. Section 839.07, Florida Statutes, 1941, provides that it shall be unlawful for any state, county or municipal officer to bid for or enter into any contract for public works in the letting of which contract such officer was a party. Section 839.08 declares it to be unlawful for any state or county officer to purchase supplies or materials for public use from himself or from any firm or corporation in which he is interested. Section 839.09 provides that it shall be unlawful for any state, county or municipal board to purchase supplies, goods or materials for public use from any firm or corporation in which any member of such board is either directly or indirectly interested. Section 839.10 declares it shall be unlawful for any state or county officer or member of any state or county board to bid for, enter into or be in any manner interested in any contract for public works for which such officer or board may be a party to the letting.

Although the foregoing statutes do not prohibit the employment of a member of a state board by that board, they are indicative of the

legislature's policy toward dealings between public officers and themselves in their private capacities and between public boards and their members.

Facts similar to those under consideration were before the Kansas Supreme Court in the case of *State v. Dean*, 176 Pac. 633. In 1913 the legislature had created the Panama-Pacific Exposition Commission consisting of five members to be appointed by the governor. The members were to serve without compensation but were to employ a secretary whose compensation was to be fixed by the commission. The defendant was duly appointed to the commission and, with the governor's approval, was appointed secretary by the commission. He received compensation allowed him as secretary but later the state sued to recover the sums paid him. In holding that the state was entitled to recovery the court said:

"It is quite clear that a very unfortunate, but perfectly innocent, mistake has been made. The commission could no more pay one of its own members compensation to do work in furtherance of the object of the creation of the commission than it could let to itself the contracts for the erection of the exposition buildings. * * * The members of the commission were charged with the execution of an important public trust, as agents, at least, of the state, and the same public policy which underlies the statute forbids an agent of a private individual, even, or any one acting in a fiduciary relation, to tempt his own loyalty by entering into any transaction which requires him to play a dual role. It makes no difference that the defendant did not participate in the forbidden acts, or that no fraud or wrong was intended, or resulted. The prohibition was laid on the commission as a body not to disburse the public funds to the advantage or profit of its own membership, in order to forestall enticement to subordinate the public to private interests."

In the light of the foregoing it is my conclusion that, at least in the absence of specific legislative authority, the employment of one of its members by the State Board of Examiners for Nurses is against public policy and beyond the powers of the board. The legislature has not attempted to grant specific authority to that board to employ one of its members as license investigator.

May 2, 1946.—046-184.

COUNTY PURCHASES—FIRM COMMISSIONER

QUESTIONS: 1. Where purchases of materials and supplies exceed the sum of \$1,000.00 and therefore require competitive sealed bids, to be opened by the purchasing agent of Dade county in the presence of the county commissioners of said county at a regular or special meeting of the board of county commissioners, and the law requires contracts thereon to be awarded to the lowest responsible bidder, and further requires that where bids are not satisfactory to the county commissioners and to the purchasing agent they shall be rejected, is it lawful for the award to be made to a company of which one of the members of the board of county commissioners is a stockholder when said company is the lowest responsible bidder?

2. Is it lawful for the purchasing agent of Dade county to purchase from a company of which a member of the board of county commissioners of said county is a stockholder, materials and supplies for the use of said county, upon requisition signed by one or more of such county commissioners, when any individual purchase is not in excess of \$1,000.00?

To Messrs. Hudson & Cason, Attorneys at Law, Miami, Florida:

In my opinion both of these questions should be answered in the negative.

Section 839.09, Florida Statutes, 1941, reads as follows:

"No state or county board or municipal board or council shall purchase supplies, goods or materials for public use from any firm or corporation in which any member of such board is either directly or indirectly interested, nor shall any such board pay for such supplies, goods or materials so purchased. Any person violating the provisions of this section shall be punished, upon conviction, by fine not exceeding five hundred dollars or imprisonment not exceeding one year; provided, that no member of any board aforesaid who shall have recorded his vote against such illegal purchase, or who shall have been absent at the taking of the vote thereon, shall be convicted of a violation of this section."

I am not unmindful of the fact that Dade county has a purchasing agent as provided by Chapter 18468, Special Acts of 1937, as amended by Chapter 23234, Special Acts of 1945. It is true that this special act provides for the election of such purchasing agent, but it says further that:

"It shall be the duty of the said purchasing agent to purchase upon, and only upon, the approval of the county commissioners of Dade county, Florida, all materials, machinery and supplies of any character whatsoever to be used by the County of Dade, State of Florida."

Inasmuch as the purchases by the said agent are to be done only upon the approval of the board of county commissioners, in my opinion the purchasing agent is only the alter ego for the said board and the board is, in effect, doing the purchasing of the said materials.

I am not unmindful of the fact that in some instances it might develop that the company of which a member of the board of county commissioners holds stock, might be the only one in Miami from which necessary supplies can be purchased; that perhaps at times it might develop that there are only two companies in Miami from which necessary supplies can be purchased by the county commissioners, and in one of which a member of the board of county commissioners may own stock. This, in effect, leaving only one company in Miami which can bid on such supplies in excess of \$1,000.00. Such possibilities were, however, for the consideration of the legislature when it enacted said Section 839.09, and they afford no reason for purchasing materials and supplies contrary to the provisions of said law.

FALSE PRETENSES, FRAUDS AND OTHER CHEATS

June 26, 1945.—045-154.

FRAUDULENT PROMISE—OBTAINING PROPERTY

QUESTION: Where a person obtains property solely by means of a fraudulent promise to perform labor or service, is he guilty of any crime, either common-law or statutory?

To Honorable C. H. Bourke Floyd, County Prosecuting Attorney, Franklin County, Apalachicola, Florida:

The only applicable statute was Section 817.09, Florida Statutes, 1941, which was designed to punish as a crime the obtaining of money or property by means of a fraudulent promise to perform labor or service. This statute has been invalidated by the United States Supreme Court in *Pollock vs. Williams*, 64 S. Ct. 792.

Section 817.01, Florida Statutes, 1941, makes it a crime to obtain property by false pretenses, but does not cover a mere false promise

without a false statement of a past or present existing fact. *Scarlett v. State*, 6 So. 767. *Morris v. State*, 45 So. 456. *Finlay v. State*, 12 So. 2d 112. Said cases are in accord with the general rule. 35 C. J. S. 648-9. 22 American Jurisprudence, 452.

It appears that the common-law cheat was the only common-law crime dealing with obtaining property by false pretenses. Common-law cheats fall into two classes: (1) public cheats, directed against the government or immediately injuring the interests of the public; (2) private cheats, employed directly against individuals. Obtaining property by means of a fraudulent promise to perform work is not a public cheat because it is not directed against the government and does not immediately injure the interests of the public. Nor is it a private cheat, which requires a false symbol or token of such character as, when not false, is commonly accepted by the public for what it purports to represent. Mere words do not amount to a token under the common law. See 35 C. J. S. 640-642, paragraph 4. 22 American Jurisprudence, 446, paragraph 2.

My conclusion is that the obtaining of property by a fraudulent promise to perform labor or services is not a common-law offense and that we have no statute under which such action may be prosecuted.

April 22, 1946.—046-165.

SHERIFFS—FRAUD WARRANTS

QUESTION: Must a sheriff serve fraud warrants from other counties based on Section 817.09, Florida Statutes, 1941?

To Honorable W. H. Wells, Sheriff, Flagler County, Bushnell, Florida:

The United States Supreme Court has declared this section of our statutes to be invalid (*Pollock v. Williams*, 322 U. S. 4).

I am not unmindful of the rule that:

"Under the statutes it is made the duty of sheriffs and constables to serve all warrants coming into their hands which are fair and valid on their face, in default or neglect of which they are subject to certain penalties." *Osceola County v. State*, 155 So. 119.

If it appears on the face of the warrant that it is based on Section 817.09, which has been declared invalid and which you know of your own knowledge to be the fact, in my opinion you have the right to refuse to serve same, and I do not think that any of our courts would even attempt to subject you to any penalties for failure to serve such a warrant; however, as I said before, I think it is imperative that this warrant show on its face that it was based on an invalid statute.

WEAPONS AND FIREARMS

April 2, 1946.—046-142.

CONCEALED WEAPONS—FORFEITURE

QUESTIONS: 1. What disposition legally can be made of pistols taken from an arrested person, when defendant pleads guilty to carrying a pistol without a permit?

2. Can these pistols be returned in any instance to their owners, legally?

To Honorable G. S. Chamberlin, Justice of the Peace, Tenth District, Micanopy, Florida:

The carrying of such a weapon on the person is denounced by Sections 790.01 and 790.05, Florida Statutes, 1941, and similar statutes. Section 790.08, as amended by the laws of 1943, makes the said weapon subject to forfeiture when used or attempted to be used in the commission of a crime.

The carrying of a concealed pistol, as denounced by the said sections does, in my opinion, involve the use or attempted use of the weapon and renders it subject to forfeiture if the person carrying same is found guilty, as provided by said Section 790.08, as amended.

The defendants having pled guilty, the weapons should not be returned to them.

November 26, 1945.—045-377.

HUNTING—FORFEITURE AND SALE

QUESTION: Upon the conviction of a person charged with hunting a game animal in open season with a shotgun or rifle between sunset and half an hour before sunrise in violation of Rule 16 of the rules and regulations of the Game and Fresh Water Fish Commission, is such shotgun or rifle, as the case may be, forfeited and sold under Section 790.08, Florida Statutes, 1941?

To Honorable I. N. Kennedy, Director, Game and Fresh Water Fish Commission:

Section 790.08 provides in part that:

"The officer making any arrest under the preceding sections shall take possession of any arms or weapons found upon the person arrested, and shall retain the same until after the trial of such person, and if he is convicted, said arms or weapons shall be forfeited, and the sheriff shall sell the same at public sale * * * ." (Emphasis supplied).

The aforesaid section is in Chapter 790, relating to "Weapons and Firearms." Of the "preceding sections" of such chapter, the one immediately involved here is Section 790.07, which reads:

"Whoever, when lawfully arrested while committing a criminal offense or a breach or disturbance of the public peace, is armed with or has on his person any sling shot, metallic knuckles, billies, firearms or other dangerous weapon, shall be punished * * * ."

It was provided by Section 69 of Chapter 11838, Laws of Florida, 1927 (Section 1970, Compiled General Laws of Florida, 1927) that:

"All guns, * * * used in or accessory to the violation of the provisions of this article, during the closed season, shall, upon conviction of the user thereof, be forfeited to the State of Florida and sent to the state game commissioner immediately after such conviction. At the end of each fiscal year the state game commissioner shall sell to the highest bidder all guns, * * * ."

However, the last quoted provision was not included in Florida Statutes, 1941, and, therefore, was repealed by Section 2 of Chapter 20719, Laws of Florida, 1941. The repeal of such provision indicates it was contemplated by the legislature that thereafter guns used in the violation of the game laws of this state should not be forfeited.

Moreover, Rule 16 was adopted by the Game and Fresh Water Fish Commission pursuant to Section 30, Article IV of the Constitution of the State of Florida and Chapter 21945, Laws of Florida, 1943, and Sections 6 and 7 of such chapter (Sections 372.83 and 372.84, 1943 Supplement to Florida Statutes, 1941), state that:

"Section 6. Any person violating any of the provisions of this act, or any rule, regulation or order adopted by the Game and Fresh Water Fish Commission pursuant to Section 30, Article IV, of the Constitution of the State of Florida, shall be guilty of a misdemeanor.

"Section 7. Any person convicted as aforesaid shall forfeit to the State of Florida any license or permit that may have been issued to him under the provisions of this act, or other law of this state relating to game shall forthwith surrender the same to the court. If such violation occurs in the open season, relating to game, no license or permit shall be issued under the provisions of this act to such person at any time during the remainder of such open season, or if such violation occurs during the closed season no license shall be issued to such person for the open season on game next following."

The embodiment in said Section 7 of a specific provision for the forfeiture of licenses and permits without any reference whatsoever to guns lends strong support to the above statement as to what was contemplated by the legislature.

Predicated upon the foregoing and a consideration of the remaining sections of Chapter 790 and other pertinent laws, as well as the sources and histories of such sections and laws, it is logical to conclude the legislature never intended that Section 790.08 should apply upon the conviction of a person charged with a violation of that portion of Rule 16 set forth in your question and, consequently, it is my opinion that such question is answered properly in the negative.

VIOLATIONS OF CERTAIN COMMERCIAL RESTRICTIONS

December 11, 1945.—045-385.

FICTITIOUS NAME STATUTE—LIMITED PARTNERSHIP

QUESTION: Is the fictitious name statute applicable to a limited partnership?

To Honorable E. B. Leatherman, Clerk of the Circuit Court, Dade County, Miami, Florida:

Our "Fictitious Name Statute," Section 865.09, Florida Statutes, 1941, became a law in 1941. The "Uniform Limited Partnership Act," being Chapter 620, Florida Statutes, 1941, became a law in 1943.

The certificate required by the "Uniform Limited Partnership Act" is substantially the same as the certificate required by the "Fictitious Name Statute" and both certificates are required to be recorded in the office of the clerk of the circuit court where the principal place of business is located. The only material difference is the fact that publication of the intention to register the fictitious name is required by the "Fictitious Name Statute."

In my opinion when the legislature passed the "Uniform Limited Partnership Act," it intended, as far as such partnerships are concerned, to take them out of the operation of the "Fictitious Name Statute."

September 16, 1946.—046-402.

FICTITIOUS NAMES—REGISTRATION

QUESTION: Must a partnership name such as "Jones & Company," composed of two persons in the same family, whose surnames are Jones, be registered under the fictitious name statute, being Section 865.09, Florida Statutes, 1941?

To Honorable Frank R. Greene, Attorney at Law, Ocala, Florida:

In my opinion, under these circumstances it is not necessary to register such a name under the said statute.

WORTHLESS CHECKS

December 27, 1945.—045-395.

VENUE OF PROSECUTION

QUESTION: If a man is arrested for a worthless check where should he be tried, in the county he gave it or some other county?

To Mr. A. A. Bates, Constable, Sebring, Florida:

Section 832.01, Florida Statutes, 1941, says:

"Any person who, with intent to defraud, shall make, utter, draw, deliver or give any check, draft or written order upon any bank, person or corporation and who secures money, property or other thing of value therefor . . ."

Section 910.03, Florida Statutes, 1941, says:

"In all criminal prosecutions the trial shall be in the county where the offense was committed unless otherwise provided by law."

Section 910.05, Florida Statutes, 1941, says:

"Where several acts are requisite to the commission of an offense, the trial may be in any county in which any of such acts occurs."

In the case of *Connor v. State*, 10 So. 891, a case which dealt with a statute somewhat similar in purport to said Section 910.05, it was there held that the prosecution could be brought either where the property was obtained by means of false pretenses or in the county where the pretenses were made, **provided the proper way of pleading the offense be laid**. It is true that the case of *Connor v. State* is one concerning the receiving or obtaining of property under false pretenses, but I think it is analogous to this case.

In my opinion, therefore, the prosecution can be had either in the county where the money or property or thing of value was obtained, or in the county where the check was made, uttered, drawn, delivered or given.

CHAPTER XXXVII

CRIMINAL PROCEDURE

ARRESTS

October 31, 1946.—046-458.

MUNICIPAL OFFICERS—PURSUIT—ORDINANCE VIOLATOR

QUESTION: Under the general laws of Florida, may a municipal police officer, in whose presence a municipal ordinance is violated, immediately pursue the violator beyond the limits of the municipality and arrest him beyond such limits?

To Honorable E. H. Mason, Mayor;

To Honorable Thomas A. Howze, Jr., City Attorney, Palmetto, Florida:

I note that your letter mentions Section 901.15, Florida Statutes, 1941, as amended by Chapter 21782, Acts of 1943, which provides that a peace officer may, without warrant, make an arrest:

(1) When the person to be arrested has committed a felony or misdemeanor or violation of a municipal ordinance in his presence. In the case of such arrest for misdemeanor or violation of a municipal ordinance, the arrest shall be made immediately or on fresh pursuit.

If Section 901.15, as amended in 1943, authorizes a police officer to pursue and arrest an ordinance violator beyond the municipal limits at all, it authorizes such pursuit to the farthest reaches of the state. I do not think that said statute contains authorization for any pursuit and arrest beyond the municipal limits at all.

Even if a police officer is armed with a municipal court warrant, he is not authorized to serve it beyond the limits of the county in which the municipality is situated, and then only by virtue of authority conferred by statute. See Section 168.03, Florida Statutes, 1941.

It would be a radical departure from the general rule for the legislature to authorize a municipal police officer to pursue an ordinance violator to whatever part of the state the chase might lead, and there make an arrest without a warrant, and I think that if the legislature had intended any such result by the enactment of said statute, such intention would have been clearly expressed.

As stated in *Rogers v. Schroeder*, 287 S. W. 861:

"The power of such officers (referring to municipal police officers) to arrest without process for mere quasi criminal offenses arising from the violation of ordinances is liable to serious abuses, and ought not to be enlarged by judicial construction beyond what is expressly granted or necessarily implied in the statute."

I do not find anything to indicate that the power of municipal police officers to pursue an ordinance violator outside the municipal limits and there arrest him without a warrant is either expressly granted or necessarily implied in Section 901.15, as amended in 1943, or in any other general statute. Therefore, it is my opinion that the applicable law is the general rule that a municipal police officer cannot make arrests beyond the boundaries of the municipality, in the absence of statutory permission. See 4 American Jurisprudence 35, Section 51; 6 C. J. S. 610. Also see Annotation, 51 L. R. A. 214.

November 29, 1946.—046-488.

ARREST FOR FELONY—RIGHT TO COUNSEL

QUESTIONS: 1. Upon the arrest of a person for a felony does the sheriff have the right to deny this person the right to have an attorney prior to the completion of the investigation?

2. When witnesses are summoned by defense attorneys should the attorney or the state pay witness fees?

To Honorable J. T. Shepherd, Sheriff, St. Johns County, St. Augustine, Florida:

In answer to your first question, Section 901.24, Florida Statutes, 1941, which is a part of our criminal code and became a law in 1939, says:

"Any attorney at law entitled to practice in the courts of this state shall, at the request of the person arrested or some one acting in his behalf, be permitted, forthwith upon his request, to visit the person arrested and to interview him privately."

One of our circuit judges has ruled, in construing this statute, that counsel has the right to communicate with his client even though the arresting officials have not completed their investigation. (Notes Criminal Procedure Act Annotated by Atkins, Section 24.)

In this ruling, I concur.

Therefore, your first question should be answered in the negative.

In answer to your second question, I assume that the defendant has not been adjudged an insolvent or acquitted.

Sections 932.33 and 932.35, Florida Statutes, 1941, will govern the payment of witnesses in criminal cases.

In the light of this law and the assumptions which I have made, it is my opinion that the defendant should pay for witnesses subpoenaed by him or his counsel.

December 4, 1946.—046-493.

MUNICIPAL JUDGE—STATE LAW—COMMITMENT

QUESTION: Section 901.01, Florida Statutes, 1941, declares that all judicial officers are committing magistrates before whom should be brought those arrested for violation of state laws. The case of *Farragut v. City of Tampa*, 22 So. 2d. 647, syllabus 6, says:

"Judges of municipal courts are 'judicial officers'."

As municipal judge of the city of West Palm Beach, would I have the authority to act as a committing magistrate before whom should be brought those arrested for violation of state laws?

To Honorable Ed Lake, Municipal Judge, City Hall, West Palm Beach, Florida:

A careful reading of the said case of *Farragut v. City of Tampa* discloses the fact that the court was careful to limit the jurisdiction and powers of a city court, and I cannot see where it gives to municipal judges any authority to act as committing magistrates before whom should be brought those arrested for violation of state laws.

In my opinion, your question should be answered in the negative.

September 24, 1946.—046-394.

APPEARANCE BOND—FIXED BY MAGISTRATE

QUESTION: After arresting a man for reckless driving of an automobile, is the sheriff authorized to fix the amount of an appearance bond for such person arrested?

To Honorable J. L. Baggett, Sheriff, Dixie County, Cross City, Florida:

Sections 901.06 and 901.23, Florida Statutes, 1941, state that it is the duty of the officer arresting with a warrant (Section 901.06) and without a warrant (Section 901.23) to take the person arrested before a magistrate, and it is the duty of the magistrate to fix the amount of the bail (Section 902.14). Therefore, your question must be answered in the negative as I find no law authorizing the sheriff to fix the amount of appearance bonds in criminal cases. However, you can get your county judge, in advance, to fix amount of bonds to be required in these cases and exact such bond yourself without further reference to the county judge upon his authorization and direction.

August 19, 1946.—046-350.

TRIAL OF DEFENDANT—ESTREATURE OF BOND

QUESTION: Highway patrolmen and county sheriffs have been furnished forms for receipts for cash bonds taken in traffic cases, upon which is printed above the place for the defendant's signature, "failure to appear will be considered as a plea of guilty and the above money applied as the fine." This form is signed by the defendant after being told by the arresting officer that the trial can be held in his absence if he requests and a plea of guilty entered for him. The defendant tells the arresting officer to request the court for trial of him in his absence and to enter a plea of guilty for him. On the day stated in said cash bond the defendant fails to appear. The arresting officer informs the judge that the defendant requested a trial in his absence and if he failed to appear, for the arresting officer to enter a plea of guilty for him. Thereupon the court proceeds with the trial pursuant to the request; plea of guilty is entered for the defendant by the arresting officer; the court accepts the plea, enters judgment and fines the defendant the amount mentioned in the bond and the money in the bond is applied against the fine and costs. Should the county judge of Brevard county, which has jurisdiction of the offense, try a defendant under these circumstances or should he estreat the cash bond?

To Honorable Bryan Willis, State Auditor:

First, let me say that a deputy sheriff has no authority to accept bonds upon the arrest of criminals by him. Under Sections 901.05 and 901.23, Florida Statutes, 1941, it is the duty of that officer to take persons arrested by him before the nearest or most accessible magistrate and that magistrate sets the amount of the bond.

Under Section 321.05, highway patrol officers do have authority to accept bonds in traffic cases. That section reads in part as follows:

"It shall be the duty of all officers of the Florida highway patrol, under the direction and supervision of said director, to perform the following duties and functions: . . . or obtain from such person arrested a good and sufficient bond requiring his appearance before the proper tribunal of such county to answer the charge for which he was arrested . . . All patrol officers are hereby directed to immediately deliver all bonds accepted and approved by them to the sheriff of said county . . ."

The county judge is authorized under Section 914.01, paragraph 8, Florida Statutes, 1941, to try all misdemeanor cases in the absence of

the accused and at his request. Under Section 905.26, he may estreat any bond lawfully taken. The taking of the bond can be done by a highway patrol officer, and not by a deputy sheriff, for such deputy sheriff, as shown above, has no authority to take such bonds.

If the bond were estreated, while this might eliminate the solicitor's fee of \$5.00 and the county judge's fee of \$.95, which are incurred in case of trial, still the estreature of the bond would not be a trial of the case and a trial of the case would have to be had before judgment and sentence could be entered against the defendant.

I believe it would be best to thus end the case by trial where the highway patrolman has made the arrest and taken the bond or where a deputy sheriff has made the arrest, and the proper committing magistrate has set the bond, and the accused has requested a trial in his absence, rather than to merely estreat the bond and keep the case open.

May 13, 1946.—046-238.

SERVICE OF CRIMINAL WARRANT—DEPUTY

QUESTION: You issue a warrant for the arrest of a person and no official arresting officer is available. Do you have authority to appoint a deputy for the service of such a warrant in a specific case?

To Honorable G. W. Shipp, Justice of the Peace, Boca Grande, Florida:

Section 901.04, Florida Statutes, 1941, says:

"The warrant shall be directed to all and singular the sheriffs and constables of the State of Florida. It shall be executed only by a sheriff or constable of the county in which the arrest is made, unless the arrest is made in hot pursuit, in which event it may be executed by any sheriff or constable who is advised of the existence of said warrant. An arrest may be made on any day and at any time of the day or night."

In view of the above law, in my opinion, your question should be answered in the negative.

December 11, 1945.—045-384.

CONSTABLE FEES—ARREST IN ANOTHER COUNTY

QUESTIONS: 1. If a warrant is issued in one county and served in another county and the party does not request bail in arresting county, or is admitted to bail and his bail is not forthcoming—the warrant being valid on its face—is the constable of the issuing county entitled to his fees and costs even though the accused is released on habeas corpus because the warrant charged no offense?

2. Is the constable entitled to his fee even though such warrant is not endorsed with the amount of bail and the return day on the back thereof?

To Honorable C. D. Crews, Constable First Justice District, DeSoto County, Arcadia, Florida:

"On November 8, G. P. Lamb, justice of the peace for the First Justice District of DeSoto county, Florida, issued a warrant against one David Bates for obtaining money fraudulently. This warrant was served in Gadsden county, Florida by the constable of the Ninth District, to whom I paid fees in the amount of \$11.75. I brought him back here and my charges were \$146.44.

"He was subsequently released on habeas corpus, and the board of county commissioners has refused to pay my fees or the

amount paid by me to the constable in Gadsden county making the arrest, saying that the arrest was illegal inasmuch as there was no endorsement on the warrant as to the amount of bond to be accepted in Gadsden county, and for the further reason that the circuit court has held that the warrant charged no offense."

Section 901.03, Florida Statutes, 1941, says:

"The warrant of arrest shall: (7) In all offenses bailable as of right be indorsed with the amount of bail and the return day on the back of the warrant."

The lack of such indorsement will not prevent a constable from receiving compensation or reimbursement allowed by law. *Gray v. Leon County*, 118 So. 305.

Section 901.07, Florida Statutes, 1941, says:

"(1) When the arrest by virtue of a warrant occurs in a county other than that in which the alleged offense was committed and the warrant issued, if the person arrested is bailable as of right in respect of the offense set forth in the warrant, the officer making the arrest shall, upon being so requested by the person arrested, take him before a magistrate or other official of such county having authority to admit to bail for such offense, who shall admit him to bail for his appearance before the magistrate who issued the warrant.

"(2) If the person arrested is not bailable as of right in respect of the offense set forth in the warrant, or if, on the admission to bail of the person arrested, bail is not forthwith given, the officer who made the arrest or the officer having the warrant, shall take the person arrested before the magistrate who issued the warrant."

If the party charged with the crime requested to be admitted to bail in Gadsden county, Florida, he should have been allowed to give bail. *Ex parte Hatcher*, 98 So. 72.

If the party charged did not request bail or, if admitted to bail, and his bail was not forthcoming, you would be entitled to your fee, provided the warrant was valid on its face. *Gray v. Leon County*, supra, *Osceola County v. State ex rel Newton*, 155 So. 119.

If, however, the accused demanded bail in Gadsden county and was ready, willing and able to give same, and this request was refused, you are not entitled to compensation even though the warrant was valid on its face.

The fact that on habeas corpus the accused was discharged because the warrant charged no offense, would not of itself prevent you from compensation, if the warrant was fair and valid on its face. *Osceola County v. State ex rel. Newton*, supra, says:

"Furthermore, under the express terms of Section 8488, C. G. L., Section 6174, R. G. S., the costs for executing a warrant incident to a commitment trial before a magistrate are payable by the county, even in cases where no information is filed nor indictment found. It was the purpose of this stated exception found in Section 8488, C. G. L., supra, to protect an arresting officer in his right to the collection of his costs for executing a warrant issued by a committing magistrate without regard to the nature or cause of the accusation, or the foundation in law or fact for the charge made. This is so, since under the statutes it is made the duty of sheriffs and constables to serve all warrants coming into their hands which are fair and valid on their

face, in default or neglect of which they are subject to certain penalties. See Section 7522, C. G. L., Section 5383, R. G. S., Section 4594, C. G. L., Section 2896, R. G. S."

As to the amount paid by you to the constable of Gadsden county, the facts that the warrant was not indorsed and that the accused person was discharged on writ of habeas corpus would not of themselves prevent repayment to you of these costs, if the warrant was fair and valid on its face.

I do not pass upon the legality of the several items making up your cost bill and amount paid by you to the Gadsden county constable.

March 2, 1945.—045-90.

CONSTABLES—TERRITORIAL JURISDICTION

QUESTION: Does a constable have authority to make an arrest without a warrant in any part of his county in his capacity as a peace officer?

To Honorable R. R. Robinson, Constable, Sumter County, Wildwood, Florida:

Section 901.15, Florida Statutes, 1941, provides that "a peace officer may without warrant arrest a person" in the instances named in said section.

This statute applies to sheriffs as well as to constables and of itself imposes no territorial limitations on arrests by either without warrant. It not only does not restrict a constable to making such arrests in his own district, but does not even restrict him to his own county. Nor does it restrict a sheriff to making such arrests in his own county. If there were no other law on the subject, a constable of a peaceful, thinly-settled, or otherwise unprofitable district could, while remaining an inhabitant of said district, station himself not only at any place in his own county but at any place in the entire state that might appeal to him as being a more lucrative field of operation and there enhance his earnings by making any and all arrests without warrants authorized by said statute. By the same token, there is nothing in this statute to prevent a poorly paid sheriff of a small county from, while retaining his residence there, leaving a deputy in charge and hieing himself off to a center of population in a larger county and there making any and all arrests without warrant authorized by said statute. If there were no territorial limitation on the authority of a peace officer to make arrests without warrant other than is provided by said statute, every peace officer would in effect be elected as a peace officer for the State of Florida at large—a situation not contemplated by the legislature in enacting said statute.

Said Section 901.15 must be construed in the light of the general rule as to territorial jurisdiction of peace officers laid down in the following citations:

7. TERRITORIAL EXTENT OF AUTHORITY TO ARREST WITHOUT A WARRANT

"§51. Generally.—A public officer appointed as a conservator of the peace for a particular county or municipality as a general rule has no official power to apprehend offenders beyond the boundaries of the county or district for which he has been appointed." 4 American Jurisprudence, page 35, §51. To same effect, see Annotation; 51 L. R. A. 214.

"In the absence of statutory permission, a peace officer, when making an arrest within the state, has authority to make an ar-

rest only within the confines of the geographical unit of which he is an officer." 6 Corpus Juris Secundum, page 610.

Applying the rule set out above, it is my opinion that a constable has no authority to make an arrest without warrant in any part of his county outside of his own district, except: (1) upon lawful hot pursuit of a fleeing criminal; and (2) when acting as a private citizen and exercising the same right as any other private citizen to make an arrest without warrant.

Former contrary opinions of this office are overruled.

December 27, 1945.—045-396.

CONSTABLE—DISPOSITION OF PRISONER AFTER ARREST

QUESTION: Is it lawful for a constable to make an arrest in his district and turn over the prisoner to any other officer in his district for trial when the justice of the peace is available in that district?

To Mr. G. P. Lamb, Justice of the Peace, District No. 1, Arcadia, Florida:

Section 23 of the Criminal Procedure Act, Section 901.23, Florida Statutes, 1941, says:

"An officer who has arrested a person without a warrant, shall without unnecessary delay take the person arrested before the nearest or most accessible magistrate in the county in which the arrest occurs, having jurisdiction, and shall make before the magistrate a complaint, . . .; or, if that magistrate is absent or unable to act, before the nearest or most accessible magistrate in the same county."

As to which is the most accessible magistrate is a matter which must of necessity be left to the discretion of the constable.

Section 6 of the Criminal Procedure Act, Section 901.06, Florida Statutes, 1941, says:

"When the arrest by virtue of a warrant occurs in the county where the alleged offense was committed and where the warrant was issued, the officer making the arrest shall without unnecessary delay take the person arrested before the magistrate who issued the warrant or, if that magistrate is absent or unable to act, before the nearest or most accessible magistrate in the same county."

You understand that the above quoted statute refers to a preliminary examination only. As for trial jurisdiction of misdemeanor cases, I rendered an opinion, dated September 8, 1944, addressed to Honorable John H. Treadwell, Jr., county attorney, DeSoto county, Arcadia, Florida, that a justice of the peace in that county had no jurisdiction to try any criminal case.

November 30, 1945.—045-369.

FINE AND COSTS—ACCEPTANCE BY STATE AND COUNTY OFFICERS

QUESTIONS: 1. May an arresting officer, either state or county, legally accept a fine and costs from a person who has committed a misdemeanor in that officer's presence, when such fine and costs have not been imposed by a judge having jurisdiction to try the offense?

2. After receiving such fine and costs, may such officer enter a plea of guilty for the person so arrested in the absence from court of such

arrested person, the person so arrested having requested such plea of guilty to be so entered?

To Honorable D. R. Partin, County Judge, Taylor County, Perry, Florida:

Section 901.23, Florida Statutes, 1941, says:

"An officer who has arrested a person without a warrant, shall without unnecessary delay take the person arrested before the nearest or most accessible magistrate in the county in which the arrest occurs, having jurisdiction, and shall make before the magistrate a complaint, which shall set forth the facts showing the offense for which the person was arrested; or, if that magistrate is absent or unable to act, before the nearest or most accessible magistrate in the same county."

A fine and/or costs cannot be imposed by anyone other than a judicial officer having jurisdiction to try the offense.

It is, therefore, my opinion that your first question should be answered in the negative.

As to your second question, inasmuch as such officer has no authority to accept such fine and costs, it is unnecessary to decide whether or not such officer may enter a plea of guilty for such person at a trial at the latter's request.

INDICTMENT AND INFORMATION

May 8, 1945.—Q45-110.

COUNTY SOLICITORS—OATHS TO INFORMATIONS BEFORE NOTARY PUBLIC

QUESTION: May a county solicitor verify information filed by him in the criminal court of record by oath taken before a notary public?

To Honorable Charles H. Ross, Assistant County Solicitor, Tampa, Florida:

Article V, Section 28, of the constitution of Florida, prescribes that all offenses triable in the criminal courts of record shall be prosecuted **upon information under oath.**

Section 10 of the declaration of rights of the constitution of Florida says that no person shall be tried for felony other than a capital crime unless on presentment or indictment by a grand jury or **upon information under oath.**

Section 906.04, Florida Statutes, 1941, says that all informations shall be subscribed by the prosecuting attorney and verified by his oath, but does not say when or before whom this shall be done.

Section 32.18, Florida Statutes, 1941, says that all offenses shall be prosecuted in the criminal court of record **upon information under oath.**

Section 90.01, Florida Statutes, 1941, provides that certain judges and clerks and **notaries public** may administer oaths in all cases in which by law oaths are required to be administered. It is to be noted that this section does not include clerks of the criminal courts of record, who derive their authority to administer oaths by Section 32.11, which gives them the same powers as are exercised by clerks of the circuit courts.

The above constitutional and statutory requirements considered, it is my opinion that an information to be filed in the criminal court of record may be verified under oath before a notary public. The legislature

of Florida gave both clerks and notaries public the power and authority to administer oaths, and I find nothing in the law tending in the slightest degree to suggest that such oaths may be taken only before the clerk of the criminal court of record or one of his deputies.

October 23, 1945.—045-330.

REWARD FOR APPREHENSION OF PRISONER

QUESTION: It appears that "A" was murdered in Jackson county in 1915 and that "B" was convicted of the murder and sentenced to life imprisonment, but escaped before being transferred to Raiford and has never been apprehended. At that time the State of Florida offered a reward for the capture of "B." Is the reward still effective and will it be paid upon the apprehension of "B"?

To Honorable Millard F. Caldwell, Governor:

Your letter does not advise as to what state official, board or agency offered the reward in behalf of the State of Florida, nor pursuant to what authorization the reward was offered, and I express no opinion as to whether the offer was ever binding on the state.

The general rule is that an offer of a reward is not to be understood as intended to be perpetual, but, as in the case of other contracts, it must be considered as having been withdrawn after a reasonable time from its date. 54 C. J. 782, "Rewards," paragraph 17. To the same effect is 46 American Jurisprudence 113, "Rewards," paragraph 13, which says that an offer of a reward must be accepted by performance within a reasonable time, or it is presumed to have been revoked.

Therefore, even if it should be conceded that the offer of the reward in question was legally binding on the State of Florida when it was made, I am of the opinion that because of the lapse of approximately thirty years' time since the offer was made, it must be considered as withdrawn and no longer in effect.

November 4, 1946.—046-447.

INFORMATION—FILING—ISSUANCE OF CAPIAS

QUESTION: Upon the filing of an information by the prosecuting attorney of the county court of DeSoto county, Florida, has the clerk of said court the authority to issue a capias thereon even though the defendant named in said capias is in the custody of the sheriff or is at large on bail for the offense charged?

To Honorable Bryan Willis, State Auditor:

I assume that a warrant has already been issued and served on this defendant and that he is in custody or at large on bail because of said warrant and that the issuance of this capias by the clerk would in effect be the issuance of a second order of arrest for said defendant for the same offense.

The county court of DeSoto county, Florida, was established under Chapter 7001, Acts of 1915, and Section 4 thereof says that the said court shall function under the rules of procedure established for the circuit courts of the State.

Section 907.01, Florida Statutes, 1941, reads as follows:

"Upon the filing of an indictment or information, if the person named therein is not in custody or at large on bail for the offense charged, the judge shall direct the clerk to issue immediately or when so directed by the prosecuting attorney, a capias for the arrest of such person. The judge upon the filing

of the information or indictment, shall indicate the amount of bail, if the offense is bailable, in which case an indorsement shall be made on the capias and signed by the clerk, to the following effect: The defendant is to be admitted to bail in the sum of . . . dollars."

This chapter became a law in 1939, Chapter 19554, paragraph 130. Section 932.47, Florida Statutes, 1941, says:

"Informations may be filed by the prosecuting attorney of the circuit court with the clerk of the circuit court in vacation or in term without leave of the court first being obtained."

and Section 932.48, Florida Statutes, 1941, says:

"Upon the filing of an information, the clerk of the circuit court shall docket the information and shall, without leave or order of the court first being had and obtained, issue a capias for the arrest of the person charged; and the clerk shall likewise issue any and all other necessary process incident to the information."

and these last two sections became a law in 1935.

There seems to be a contradiction existing between Section 907.01 and Sections 932.47-48, above set forth.

Of course, in the case of such contradiction the last statute in point of time must prevail (*Hillsborough county v. Jackson*, 58 Fla. 210; 50 So. 423).

I, therefore, answer your question in the negative.

Having answered your inquiry, may I indulge in this brief discussion concerning the statute immediately involved, to wit: Section 907.01, Florida Statutes, 1941.

In my opinion, this particular statute is intended to cover the case where information by a county solicitor or indictments by a grand jury has or have been found upon the initiation of the prosecuting officer or grand jury and the person charged is not under apprehension, and a warrant (termed in the particular statute a capias) is necessary for the arrest and holding of such person so charged; this statute is not intended to authorize repetition, duplication or issuance under any other circumstances of unnecessary or dual warrants of arrest.

Where capiases are issued under the particular statute unnecessarily and placed in the hands of a sheriff to serve as a warrant for arrest or holding, and where such sheriff has already received a previous warrant or commitment in such case, that sheriff so receiving the second warrant or capias should not be allowed to charge for any service of same.

BAIL

June 8, 1945.—045-133.

ENFORCING DEFAULTED BAIL BONDS

QUESTION: What are the steps to be taken under Sections 903.26-903.28, Florida Statutes, 1941, to enforce defaulted bail bonds?

To Honorable Paul Game, Assistant County Solicitor, Tampa, Florida:

This acknowledges your letter of the 1st instant in regard to the enforcement of forfeited bail bonds in criminal cases, and I trust that the following comments will answer your several inquiries.

In my opinion, the steps to be taken under Sections 903.26-903.28, Florida Statutes, 1941, to enforce defaulted bail bonds are as follows:

(1) The court before whom the criminal case is pending must order the bond forfeited. Section 903.26(1). If money or bonds have been deposited under Section 903.16 in lieu of sureties, the order forfeiting same concludes the matter.

(2) If the bond is signed by a surety or sureties, the clerk of the court in which it is forfeited is required to **immediately** transmit the bond, together with the sureties' affidavits made in compliance with Section 903.09, to the clerk of the circuit court for recordation in the deed book. Such bond and affidavits become a lien on "the real property described in the same" from the time of such recordation.

It follows that if no real property is described in the bond or affidavits, then no lien is created by recording them. Section 903.26(2).

(3) The lien created by recording the bond and affidavits, as aforesaid, continues for one year after such recordation. However, if an action on the bond is instituted within said period, and is accompanied by the filing and recording of lis pendens, the lien continues in force until the action is determined. The only instance in which it is worthwhile to file a lis pendens is where an action on the bond cannot be wound up within said one year period. Section 903.26 (3).

(4) **Not less than thirty days nor more than one year after the date of forfeiture**, the prosecuting attorney files in the circuit court a certified copy of the order of forfeiture, and procures the circuit court to enter judgment on the bond. No notice to principal or surety is provided for. Section 903.28. I find no Florida court decision as to the validity of the requirement that judgment be entered without notice, and I do not know of any pending case involving this point. However, Section 78.19, Florida Statutes, 1941, provides for judgment without notice against sureties on forthcoming bonds in replevin suits, and the supreme court decisions cited under said section are to the effect that by signing such bonds the sureties become subject to having judgment entered against them without notice. If judgment may be taken without notice against a surety on a forthcoming bond in a replevin suit, it would appear that a judgment could also be taken without notice against a surety on a criminal bail bond.

In view of the provision of Section 903.28 that judgment shall be entered "against the person bound by the undertaking," I am of the opinion that the judgment is wholly in personam and that no useful purpose would be served by describing any lands in it. Upon its rendition, it becomes a lien upon all lands of the judgment debtor subject to the execution, as is the case with other judgments in personam. I think that such judgment lien supersedes any lien theretofore created by recording the bond and sureties' affidavits.

PROCEEDINGS TO DETERMINE MENTAL CONDITION OF DEFENDANT

June 27, 1946.—046-278.

RELEASE OF PRISONER—CONSENT OF COURT

QUESTION: Where pending his trial in the circuit court upon a criminal charge the defendant was found to be insane by the circuit judge and committed by him to the Florida State Hospital to be held there until further order of the court, when in the opinion of the proper officers of the hospital such person has been completely cured of insanity, may they release him despite the objection of the court that committed him?

To Honorable Millard F. Caldwell, Governor:

I assume that the person in question was committed to the Florida State Hospital in accordance with the provisions of Section 917.01, Florida Statutes, 1941, which section reads, in part, as follows:

"(1) If before or during trial the court, of its own motion, or upon motion of counsel for the defendant, has reasonable ground to believe that the defendant is insane, the court shall immediately fix a time for a hearing to determine the defendant's mental condition. * * *

"(2) If the court, after the hearing, decides that the defendant is sane, it shall proceed with the trial. If, however, it decides that the defendant is insane, it shall take proper steps to have the defendant committed to the proper institution. * * * If, after a defendant has been committed to an institution as insane, the proper officer of such institution is of the opinion that the defendant is sane, he shall report this fact to the court which conducted the hearing. If the officer so reports, the court shall fix a time for a hearing to determine whether the defendant is sane. * * * If found sane, the trial shall proceed; if found insane, he shall again be recommitted as hereinabove set forth. No defendant committed by a court to an institution, by reason of the examination referred to in this paragraph, shall be released therefrom, without the consent of the court committing him."

In the light of the specific language of the last sentence of the quoted section, it is clear that the question must be answered in the negative. However, consent of the court to the release of the patient may not be arbitrarily withheld. Upon the court's receiving from the proper officer of the institution his report that he is of the opinion the patient is sane, the statute requires the court to fix a time for a hearing to determine whether the defendant is sane and to conduct such hearing in accordance with the terms of Section 917.01. These provisions are mandatory and cannot be ignored by the court once the report of the proper officer of the institution has been received. After the hearing the court may, of course, exercise its sound judgment in determining whether the defendant is sane and shall stand trial or is insane and shall be recommitted to the institution.

December 6, 1946.—046-499.

JURISDICTION OF CRIMINAL COURT—PETITION

QUESTION: A person is in custody of the criminal court of record of Duval county charged with a crime and after arrest, pending trial, or after conviction, the family of such individual files a suggestion of insanity with me as county judge and insists that I make an examination to determine whether the person is sane or insane at the time of the filing of the petition. Should I entertain such a petition in view of the fact that the person is in custody and under the jurisdiction of the criminal court of record?

To Honorable McKenney J. Davis, County Judge, Duval County, Jacksonville, Florida:

In my opinion, the county judge would have no authority to entertain such a petition. Such situations are to be handled by the criminal court of record as provided in Section 917.01 and 921.09, Florida Statutes, 1941.

JUDGMENT AND SENTENCE

September 17, 1945.—045-290.

CONDITIONAL COMMUTATION—EFFECT OF BREACH OF CONDITION

QUESTION: At the May term of the Duval circuit court for 1939, "A" was convicted of the offense of murder in the first degree and sen-

tenced to death by electrocution. Upon recommendation by officials and representative citizens of Duval county, on the 20th day of November, 1940, his sentence was commuted to life imprisonment with the understanding that should he ever escape from the state prison, the commutation of sentence would stand revoked. On June 18, 1945, the said "A" escaped from the state prison.

Does the commutation of sentence become automatically revoked and what sentence will now be recorded?

To Honorable John T. Wigginton, Secretary, State Board of Pardons:

Under Article IV, Section 12 of the Constitution of Florida the pardoning board may commute punishment and grant pardons in all cases after conviction except treason and impeachment, upon such conditions and with such limitations and restrictions as the board may deem proper.

39 American Jurisprudence, Page 559, Paragraph 63, says:

"A commutation may be made on condition. It is well settled that acceptance or consent of the convict is not essential to the validity of the commutation of the sentence, but where it is accepted the convict is bound by the condition."

"There can be no doubt, where one punishment is substituted, under the laws of England, for another—as banishment for death—if the convict shall return he may be arrested on the original offense; and if he shall be found by a jury to be the identical person originally convicted, the penalty of death incurred by him may be inflicted. And the same thing may be done in regard to all offenses where, in this country, the law authorizes the pardoning power to modify the punishment and give effect to the commutation." *Ex Parte Wells*, 18 Howard 307, 15 L. Ed. 421. Dissenting opinion of Justice McLean, page 428.

"Conditional commutation of sentence granted to convict may be revoked by State Board of Pardons or by court of competent jurisdiction adjudicating breach of conditions." *Stone, Sheriff, vs. Birch*, 154 So. 128.

In my opinion the original sentence imposed upon the convict can be enforced inasmuch as the said convict breached the condition of his commutation of sentence when he escaped from the state prison.

August 6, 1945.—045-223.

FINE AND COST BONDS

QUESTION: A person is arrested, tried and convicted of a criminal offense and ordered to pay a fine and costs, and, in case of default, to serve a term in the county jail. A statutory bond is given as provided by Section 921.15, Florida Statutes, 1941. Before the expiration of the 90 days set forth in the said bond, the principal is arrested for another offense, and the sureties on said bond at once notify the Sheriff that they are surrendering the principal to him and desire to be released from the said bond and the principal be required to serve the term of imprisonment in the county jail so imposed as above mentioned. Under these circumstances, can the principal be required to serve the term in the county jail and the sureties on the said fine and cost bond be released?

To Honorable Thompson H. Getzen, County Solicitor, Dade City, Florida:

In the case of *Carver vs. State*, 183 So. 719, a defendant, who had given such a fine and cost bond, before the expiration of the 90 days, voluntarily surrendered to the sheriff and began serving his alternative

term of imprisonment in the county jail. The court held that when his sentence had been completed the bond should have been duly cancelled and the sureties released therefrom.

If a defendant (principal on a fine and cost bond) can, before the expiration of the 90 days set forth in the fine and cost bond, voluntarily surrender himself and serve his sentence and cancel his bond, it seems to me that it is nothing but just, right and proper that, under the circumstances above set forth, the defendant can be required to serve his alternative term of imprisonment, and when he has done so, his bond be cancelled and sureties thereon be release.

PROVISIONS SUPPLEMENTAL TO CRIMINAL PROCEDURE LAW

December 17, 1946.—046-511.

MINOR CHARGED WITH CRIME—NOTICE—FORFEITURE

QUESTIONS: 1. When should the notice required by Section 932.38, Florida Statutes, 1941, be given to the parent or guardian of a minor charged with a crime?

2. A minor is arrested and charged in your court with reckless driving; he gives a \$25.00 cash bail for his appearance in your court; he forfeits the bail and a record is made thereof and the money so deposited declared forfeited (Section 903.26, Florida Statutes, 1941). No notice to the parent or guardian of such forfeiture is given. (a) Is the forfeiture legal; (b) Should the forfeiture be vacated upon oral application of the parent who learns of the judgment two weeks after entry thereof; (c) May the court vacate such judgment at such date; and (d) After such forfeiture may the records of the order of forfeiture be altered, amended, or deleted, or in anywise changed so that there would be no record to the effect that the said minor had been prosecuted?

To Honorable Sam D. May, County Judge, Washington County, Chipley, Florida:

Answering your first question, in the case of *Pitts vs. State*, 102 So. 554, our court says:

"Notice of the charge before trial is all that is required."

Answering your question numbered 2 (a), I know of no reason why the order of forfeiture would not be legal. It is in nowise a trial and does not preclude a trial.

Section 903.06, Florida Statutes, 1941, says:

"Minors and married women shall be capable of binding themselves by an undertaking for the purpose of securing their release on bail in like manner and with like effect as persons sui juris."

Answering your questions numbered 2 (b) and 2 (c), Section 903.27, Florida Statutes, 1941, says:

"(1) If there is a breach of the undertaking, the court before which the cause is pending shall make a record thereof and shall declare the undertaking, and any money or bonds that have been deposited as bail, forfeited."

Section 903.26, Florida Statutes, 1941, says:

"If, at any time within ten days after the undertaking has been forfeited, the breach of the undertaking is satisfactorily explained and the defendant shall in all other respects have com-

plied with the condition of the undertaking, the court before which the case is pending may direct the forfeiture of the undertaking to be discharged upon such terms as are just."

In my opinion, the application for the forfeiture has come too late as the ten days have passed since the said forfeiture was entered by us.

Answering your question numbered 2 (d) this question will be answered in the negative for as I said before, the enforcement of a forfeiture is not a trial and even if the forfeiture is remitted, it would in nowise affect the prosecution of said minor for said charge.

SEARCH WARRANTS

August 6, 1946.—046-339.

COSTS—PROCEEDINGS—FEES

QUESTIONS: 1. When a criminal case is made in connection with a search warrant, should the costs for the search warrant be taxed with the costs in the criminal case?

2. When a criminal case is not made in connection with a search warrant, should the costs of issuing and executing a search warrant be paid by the county, or if not, by whom?

3. Should a deposit for costs be required (Section 939.16, Florida Statutes, 1941) before a search warrant is issued?

4. When an application for a search warrant is made to the judge of a court that has a clerk, is the proceeding in the court or is it merely before the judge? In other words, does the judge or the clerk perform the required clerical services and receive the fees therefor?

5. This question depends upon the answer to question 4. The clerk of the county court of Palm Beach county, which has civil jurisdiction only, writes that he is frequently directed by the county judge to take affidavits and to write search warrants, docket the proceedings and file the papers. He is compensated under Chapter 17793, Acts of 1937, by a flat fee for each civil case or proceeding. Can he charge the flat fee, or if not, what fees?

To Honorable Bryan Willis, State Auditor:

Our statutes do not fix any separate and distinct fees in relation to the issuance, etc., of search warrants.

Section 933.01, Florida Statutes, 1941, says:

"A search warrant authorized by law may be issued by any judge, including the judge of any circuit court of this state or any court of record, or criminal court of record, or county judge, justice of the peace, or committing magistrate having jurisdiction within the district where the place, vehicle or thing to be searched may be."

Section 933.07, Florida Statutes, 1941, says:

"The judge or magistrate, upon examination of the application and proofs submitted, if satisfied that probable cause exists for the issuing of the search warrant, shall thereupon issue a search warrant signed by him with his name of office, to any sheriff and his deputies or any constable, police officer or other person authorized by law to execute process, commanding the officer or person, forthwith to search the property described in the warrant or the person named, for the property specified, and

to bring the same before the magistrate or some other court having jurisdiction of the offense."

Section 933.08, Florida Statutes, 1941, says:

"The search warrant shall in all cases be served by any of the officers mentioned in its direction, but by no other person except in aid of the officer requiring it, said officer being present and acting in its execution."

Section 933.14, Florida Statutes 1941, says in part:

"... the judge or magistrate to whom said search warrant is returned shall file the same with the inventory and sworn return in the proper office ..."

In answer to your first question, in light of the foregoing statutes, it is, in my opinion, the duty of the judge or magistrate to issue search warrants when he is satisfied from application and proofs submitted to him that probate cause exists therefor. Section 933.07, Florida Statutes, 1941, requires the judge or magistrate to issue the warrants and Section 36.17, Florida Statutes, 1941, as amended by laws of 1945, and Sections 28.24 and 81.26, Florida Statutes, 1941, are broad enough to cover the fees of such judges for such services. However, only those judges or magistrates who are paid by fees, and not those paid by salaries, are entitled to a fee for issuing such warrants. As to the costs for executing search warrants: above Section 933.08, Florida Statutes, 1941, commands the sheriff, or other officer, authorized by law to execute process, to serve such search warrant. Section 3032, Florida Statutes, 1941, as amended by laws of 1945, is broad enough to fix the fees of the sheriff or constable for such services. When such a judge issues a search warrant and a criminal case is made in connection with such search warrant, the costs for issuing the search warrant and for serving same and filing the papers should be taxed as costs in such criminal case in the court to which the warrant is returned.

In answer to your second question, the same reasoning as to the costs of issuing, and serving search warrants will apply to this question, except that such costs are not taxed with the costs in the criminal case but are paid by the county.

Answering your third question, our court in the case of 71 So. Rep. 278, says that Section 939.18, Florida Statutes, 1941, refers "only to those classes of crimes where the complaining witness has suffered special damage in his own person or private property, and it has no applicability to the crime of a public nature." Therefore, whether or not a deposit should be required will depend upon the nature of the case as above set forth.

In answer to your fourth question, the statute above quoted requires the judge or magistrate to issue the search warrant provided he is satisfied that proper cause exists for the issuance thereof. Therefore, in my opinion, it is the duty of the judge or magistrate to issue the warrant and not the duty of his clerk, if he has one.

In answer to your fifth question, I know of no law which provides for the clerk of such court as you mention to take affidavits for search warrants, to write search warrants, docket the proceedings and file the papers, and to make a charge against the county therefor.

This opinion does not purport to cover costs in connection with search warrants to those counties governed by so called "population acts."

INQUESTS OF THE DEAD

December 16, 1946.—046-514.

JUSTICE OF THE PEACE—COUNTY JUDGE

QUESTION: Can the county judge hold an inquest of the dead within your justice district when you are ready, willing and able to act as a coroner to hold such inquest?

To Honorable W. P. Means, Justice of the Peace, Callahan, Florida:

Article V, Section 22, says:

"... justices of the peace shall have power to hold inquests of the dead."

Section 936.01, Florida Statutes, 1941, as amended says:

"Justices of the peace within their respective districts shall hold inquests of the dead when so directed as provided in Section 936.03, and to that extent shall be deemed coroners. In case the justice of the district in which the death occurs or the dead body is found shall for any reason be unable to hold an inquest, it shall be held by the county judge of the county in which the death occurs, or where the dead body is found, or by a justice of the peace of one of the adjoining districts of the county."

(I do not pass upon the question of whether or not you can hold inquests only when directed as provided in Section 936.03, Florida Statutes, 1941, as amended. One of our circuit judges held that you can. Our supreme court has not spoken on the subject).

In my opinion, your question must be answered in the negative.

COSTS AND FEES

September 16, 1946.—046-404.

COUNTY JUDGE—CRIMINAL COSTS

QUESTION: Should the county commissioners of Hendry county pay the county judge's criminal costs bill in certain cases as per statement of these costs submitted with your question?

To Honorable H. A. Rider, County Attorney, Hendry County, LaBelle, Florida:

An analysis of this costs bill will show:

- (1) That all but one of the cases involved are approximately five years old, and this remaining one is approximately four years old.
- (2) That in seven of the sixteen cases embraced in the said costs bill it appears from the record that no informations were filed.
- (3) That in two of the cases no warrants were ever issued.
- (4) That in the remaining cases there does not appear where any return on the warrants was ever made.

"No costs of any committing magistrate shall be paid by any county if no information or indictment is found against a person committed or held to bail by such magistrate." *Barrow v. State*, 82 So. 293. See also Section 939.14, Florida Statutes, 1941.

Owing to the ages of these cases and, in the absence of any proof to the contrary, I think, the county commissioners are within their

rights to assume that no informations were ever filed in any of the cases. It is the habit of a great many prosecuting attorneys to make no return on warrants if no informations are filed although it would be the better practice for them to endorse on the warrants the fact that no informations were filed.

I, therefore, cannot advise payment of this costs bill.

January 17, 1946.—046-17.

DELAY IN PAYING COSTS

QUESTIONS: 1. You as justice of the peace commit to the circuit court parties charged with crime, and you, within a few days, submit your costs to the county commissioners. No information is filed or indictment is found and you desire to know if you are entitled to your costs?

2. If an information is filed or an indictment found, should you be compelled to wait some months for the payment of your bill?

To Honorable J. T. Pendleton, Justice of the Peace, Alachua County, High Springs, Florida:

Section 939.14, Florida Statutes, 1941, says:

"When a committing magistrate holds to bail or commits any person to answer a criminal charge in a county court, a criminal court of record, or a circuit court, and an information is not filed nor an indictment found against such person, the costs of such committing trial shall not be paid by the county, except the costs for executing the warrant."

I think this will answer your first question.

Section 939.08, Florida Statutes, 1941, says:

"In all cases wherein any officer . . . claims the payment of any . . . costs . . . or other compensation from the county in or on account of any case or matter in a court of a justice of the peace which is payable by the county . . . an itemized bill or statement thereof shall be submitted to the county commissioners of the county in which such courts are held, and the same shall not be paid until the board of county commissioners shall have approved it . . ."

Inasmuch as you are not allowed any costs except the costs for executing the warrant wherein no information is filed nor indictment found against the party bound over to the circuit court and it is necessary for the county commissioners to audit your costs, they of necessity must wait until an information is filed or an indictment found before they can approve your costs. As you have only two terms of the circuit court in your county, I can readily see that very often you would have to wait some months before your cost bill was approved because the county commissioners would not have the facts before them to render a correct audit.

INTERSTATE EXTRADITION OF WITNESSES

February 19, 1946.—046-56.

METHOD OF SUMMONS—FEES

QUESTION: Does any authority exist whereby you might summons two witnesses, in a criminal prosecution pending in your circuit court, from Auburn, Maine, to Lake City, Florida, and what mileage and per diem would they be entitled to?

To Honorable A. K. Black, State Attorney, Third Judicial Circuit, Lake City, Florida:

I refer you to Section 942.03, Florida Statutes, 1941, which sets forth the proceedings to be had to summons such witnesses and their mileage and per diem.

The State of Maine has also passed the law relative to interstate extradition of witnesses, and which will bring into force said Section 942.03.

CHAPTER XXXVIII

CORRECTIONAL SYSTEM

PAROLE

February 25, 1946.—046-79.

ARREST OF PAROLEES—DUTY OF SHERIFF

QUESTION: Is it the duty of the several sheriffs of the state of Florida to take and hold in jail parolees arrested by parole or probation supervisors without warrants?

To the Florida Parole Commission:

Under the parole and probation statutes of this state when a prisoner is placed on parole by the parole board, the terms and conditions of that parole are fixed by the commission and the parolee is under the supervision of the commission. (Sections 947.13, 947.18, 947.19 and 947.20, Florida Statutes, 1941). "The parolee, although at large while on parole, is a prisoner no less than a prisoner physically confined. He is under daily personal restraint. He is at all times answerable to prison system officials for his conduct. Such officers have authority to greatly circumscribe his freedom of choice and action." Parolees, under the statutes of this state, are "trustees outside prison walls, as it were." (*Sellers v. Bridges*, 153 Florida, 15 So. 2d. 293 A. L. R. 1240). A parolee is not a free man and continues in legal custody of prison officials. Parole statutes simply provide for a different manner of serving a sentence than by confinement in a prison. He is merely living beyond the prison enclosure. (39 Am. Jur. 525; 44 C. J. 1204).

When any parole or probation supervisor has reason to believe that a parolee has violated the terms and conditions of his parole, he may arrest such parolee without a warrant and bring him forthwith before the commission or a member thereof. (Section 947.22, Florida Statutes, 1941). Many courts have held that when a parolee violates his parole no warrant is necessary to justify his recommitment in prison. (*Kozlowsky v. Judge*, 238 Mass. 532, 131 N. E. 188, and authorities cited). A parolee being in legal effect a prisoner in custody by prison authorities (the parole commission) after conviction, is not constitutionally entitled to bail. (8 C. J. S. 68; *Ex Parte Hyde*, 140 Fla. 494, 192 So. 159; *Pritchett v. United States*, CCA, 67 Fed. 2d. 244). After violation of his parole the parolee is subject to arrest and return to prison, in substantially the same manner as an escaped convict would be. (See *State v. Horne*, 52 Fla. 125, 42 So. 389, text 393, relation to violation of a conditional pardon).

The erection and operation of prisons and jails, whether by the state or some county or municipality, is a governmental function and an indispensable part of the administration of the criminal laws of the state. They are a part of the police system of the state for the preservation of order and the security of society. (41 Am. Jur. 886 and 887). Although there is a recognized distinction between the prisons of a state and those of its political subdivisions; unless restricted by law, the prisons of a county, city or town, all become the public prisons of the state. (50 C. J. 332). "Every county officer performs functions that are tied in with the state government and that are essential to a proper functioning of the state government." (*State v. Lee*, relating to chapter 22938, Acts of 1945, not yet reported).

Although I am of the opinion that any parole or probation supervisor who arrests a parolee without a warrant should take such parolee

before the commission forthwith and without delay, there may be times when such parolee must be held for several hours or over night before he may be brought before the commission. In such cases it would seem to be the duty of the sheriff to permit the use of the county jail to assist in holding such parolee until he may be taken before the parole commission or one of its members. Also when a parolee is arrested without warrant the person making the arrest should forthwith advise the commission or some member thereof of such arrest so as to permit the fixing of a bond for the parolee if entitled thereto. When a parolee is turned over to a jailor by a parole supervisor the jailor should be furnished with a written request for the holding of such parolee in the jail.

I am, therefore, of the opinion that the sheriffs of the several counties of the state are obligated by law to accept parolees and hold them in the county jails, after arrest without warrant, under the conditions above set out.

February 17, 1945.—045-50.

PAROLE COMMISSION—AUTHORITY

QUESTION: Has the Florida Parole Commission authority to assume jurisdiction and supervision of convicts who were granted conditional pardons and paroles by the State Board of Pardons prior to the organization of the said commission?

To Honorable John T. Wigginton, Secretary, State Pardon Board:

By opinion dated March 24, 1943, this office held that the State Pardon Board is bound by the conditions of a conditional pardon or parole, and on its being accepted by the prisoner, has no authority to impose a further condition or provision for supervision on terminating said conditions. See copy of former opinion Number 043-85.

I am, however, of the opinion that the State Pardon Board by appropriate order of the board can authorize and direct the Florida Parole Commission to act as agent for the State Pardon Board in supervising persons under parole and conditional pardon granted by the State Pardon Board, such supervision to come within and not exceed the conditions of the existing conditional pardon or parole. I am of the further opinion that the State Pardon Board can direct the Florida Parole Commission to make periodical reports to the State Pardon Board on such persons.

October 29, 1945.—046-443.

SUPERVISOR—RESIDENCE—REQUIREMENTS

QUESTION: After entering the army, a resident of Tennessee was stationed in Florida from approximately February 1, 1943 until February 25, 1943, after which he was transferred elsewhere. His wife came to Florida on February 20, 1943, with the intention of making Florida her permanent address, and she has since resided in Florida. At the time she came, he also intended to make Florida his permanent residence if he could find suitable employment here after his discharge from the army. He has lived in Florida since his discharge from the army in October, 1945. Does Mr. Nail have the residence requirements necessary to qualify him for appointment as a parole commission supervisor under Section 947.08, Florida Statutes, 1941, as amended by Chapter 21775, Acts of 1943?

To Honorable Raymond B. Marsh, Chairman, Florida Parole Commission:

Section 947.08, Florida Statutes, 1941, as amended by Chapter 21775, Acts of 1943, provides with reference to the appointment of parole commission supervisors, that:

"Only citizens of Florida who have resided in and been bona fide residents of the state for two years or more next prior to the date thereof shall be eligible for employment by the commission. . . ."

In my opinion, this question should be answered in the affirmative. The two essentials for establishing a residence in Florida are (1) bodily coming to this state, and (2) intending to remain and make one's permanent home in Florida. Mr. Nail actually came here in 1943, over two years ago, and, at that time, formed the intention of making Florida his permanent home. The fact that his coming here was the result of his service in the United States Army did not preclude his becoming a Florida resident while here. See *Gipson vs. Gipson*, 10 So. 2d. 82. Nor did he lose his Florida residence by being absent from the state in the service of his country from the latter part of February 1943 until his discharge from the army in October, 1945. His wife remained here during his absence, and he came back here upon his discharge. He could do no more under the circumstances.

It is my opinion that Mr. Nail meets the residence requirements of the statute.

PAROLE AND PROBATION, GENERAL PROVISIONS

June 26, 1945.—045-175.

PAROLE SUPERVISOR—APPOINTMENT FOR CRIMINAL COURT OF RECORD

QUESTION: Is there any way in which the parole commission may legally exercise control over and fix the compensation of a probation and parole officer appointed by the governor for the criminal court of record of Polk county under Chapter 19248, and may the parole commission and Polk county each pay a part of such compensation?

To Honorable Joseph Y. Cheney, Chairman, Florida Parole Commission:

Since rendering my opinion of June 18, 1945, in which I held that the parole commission cannot appoint a parole supervisor for the criminal court of record of Polk county because such appointive power is vested in the governor under Chapter 19248, I have your request for my opinion in answer to the above mentioned question.

Chapter 19248 creates the office of probation and parole supervisor and the person appointed to this office is a public officer, not merely a public employee. Subsection 1 of Section 949.03, Florida Statutes, 1941, gives the parole commission control over the actions of such officer only as to such probationers as are placed under the supervision of the parole commission by the criminal court of record. In all other respects, such officer is governed by said Chapter 19248 and is not subject to the control of the parole commission.

Chapter 19248 fixes the salary of the probation and parole officer appointed thereunder at \$3600.00 per year, requires that he be furnished an automobile, allows him \$25.00 per month for expense money, and permits him to employ a clerk at \$125.00 per month, and provides that all of these items shall be paid out of county funds. Therefore, the parole commission has no authority to fix the compensation of such officer or to pay any part of his compensation.

My conclusion is that if a probation and parole officer is appointed by the governor for the criminal court of record of Polk county under Chapter 19248, the parole commission can exercise no authority over such officer except as to defendants placed on probation and under the supervision of said commission and the parole commission can neither fix the compensation of such officer nor pay any part thereof.

February 18, 1946.—046-70.

PAROLEE CONVICTED OF FELONY—REVOCATION

QUESTION: A parole was granted to Reynolds Matthews on the 23rd day of February, 1943, in order that he might enter the United States Army, which parole was accepted by said Matthews. His parole period extended to January 1, 1946. On the 19th day of March, 1945, this parolee was convicted of rape by a United States military court and sentenced to life imprisonment. This fact was not known to the Florida Parole Commission until after January 1, 1946. May the commission now revoke this parole?

To the Florida Parole Commission:

This matter has never been before our Florida courts but has been before the courts of other states in the Union. A majority of them hold that "where a parole has been violated before the expiration of the time for which the prisoner was sentenced, it may be revoked after the expiration of such time if the prisoner has not been discharged from the terms of the parole. In a few jurisdictions a parole may not be revoked after the expiration of the term for which the prisoner was sentenced." 46 C. J., Pardons, 1209, paragraph 79.

The case of Kirkpatrick v. Hollowell, 196 N. W. 91, seems to be the leading case on this question and in that case will be found a list of decisions sustaining the majority opinion.

It is my opinion, if the matter is brought before the Florida court, the majority opinion above set out will be sustained as it seems to be in conformity with the better reasoning.

It is, therefore, my opinion that you can in this case now issue and file a detainer warrant with the Federal authorities.

June 18, 1945.—045-146.

PAROLE SUPERVISOR FOR CRIMINAL COURT OF RECORD— APPOINTMENT

QUESTION: May the parole commission appoint a parole supervisor for the criminal court of record of Polk county under the provisions of Subsection 2 of Section 949.03, Florida Statutes, 1941, without regard to Chapter 19248, Acts of 1939?

To Honorable Joseph Y. Cheney, Chairman, Florida Parole Commission:

Chapter 19248 created the office of probation and parole officer of the criminal court of record in all counties having a population of not less than 85,000 nor more than 165,000 according to the last federal census. This act requires the governor to appoint a probation and parole officer for the criminal court of record of all counties within said population bracket, for a term of four years and at a salary of \$3600.00 per year, and provides for certain allowances for expenses of operating the office, with such salary and expense allowances to be paid by the county.

The provision "according to the last federal census" is progressive and has reference to each federal census as it occurs. *State ex rel Buford v. Daniel*, 99 So. 804, *State ex rel Richardson v. Ferrell*, 177 So. 181, *Sparkman v. County Budget Commission*, 137 So. 809, *State ex rel Buford v. Smith*, 101 So. 350.

Under this rule, Polk county now comes within the terms of Chapter 19248 because its population was 86,665 according to the 1940 federal census.

Subsection 1 of Section 949.03, Florida Statutes, 1941, specifically provides that nothing in Chapters 947-949, Florida Statutes, 1941, shall be construed as abridging, repealing or altering Chapter 19248 except as to the handling of probationers placed under the supervision of the parole commission. Subsection 2 of said Section 949.03 gives the parole commissioners authority to appoint parole supervisors for criminal courts of record created by special legislative acts "not specifically covered by subsection 1." Subsection 2 withholds from the parole commissioners the power to appoint parole supervisors for criminal courts of record affected by legislative acts covered by Subsection 1. The criminal court of record of Polk county is affected by Chapter 19248, which is covered by Subsection 1. The result is that Subsection 2 withholds from the parole commissioners the authority to appoint a parole supervisor for the criminal court of record of Polk county. Subsection 1 continues in full force the requirement of Chapter 19248 that the governor appoint the probation and parole supervisors for the criminal courts of record affected by Chapter 19248, the population bracket of which now embraces Polk county.

It is therefore my opinion that the question presented must be answered in the negative.

CONVICTS

August 7, 1945.—045-217.

SALE OF RAMIE PRODUCED BY CONVICT LABOR

QUESTION: May the Board of Commissioners of State Institutions enter into contracts for the sale of ramie produced by convict labor?

To the Board of Commissioners of State Institutions:

At your meeting today there was submitted to you a contract between the State of Florida and the Florida Ramie Products, Inc., and, as submitted, the contract was approved by you, subject to redraft by the attorney general. (Which contract provides for the sale of ramie produced by convict labor).

The said contract has been submitted to me for my redrafting, but I see no authority for your entering into such a contract. Chapter 952.10, Florida Statutes, 1941, reads as follows:

"The board of commissioners of state institutions may use any and all such state convicts or prisoners as may, in the judgment of said board, be necessary or required for the growing of sugar cane or other crops on any state owned land within the State of Florida; providing, that the provisions of this section will not in any way affect, alter or modify the operation of the state road department in the construction of state roads with state convicts; and provided further, that none of said crops, except sugar cane, shall be sold or disposed of, but shall only be used in the various state institutions."

In view of this law, I did not redraft the contract but am returning it to you without my approval.

August 5, 1946.—046-333.

CORRECTIONAL INSTITUTION—ESTABLISHMENT

QUESTIONS: 1. May the Board of Commissioners of State Institutions establish a new combination prison and correctional institution, name to be determined, located at any point in the state and apart from any present correctional institutions, for the detention of colored female adult and minor prisoners and adult and minor delinquents?

2. If such an institution cannot be established by the board separate from other correctional institutions, could it be built at one of the present prison or correctional institutional sites?

To Honorable John T. Wigginton, Secretary Board of Commissioners of State Institutions:

It is noted that it is the desire of the board, if it is possible, to remove negro female prisoners of the State Prison Farm and place them in an institution separate and apart from the prison farm. It seems to be the further desire of the board to establish an institution for prisoners and delinquents, such to be kept separate and distinct from each other.

Article XIII, Section 2, Florida Constitution, provides that a state prison shall be established and maintained in such manner as may be prescribed by law; that provision may be made by law for establishment and maintenance of a house of refuge for juvenile offenders; and that the legislature should have the power to establish a home and work house for common vagrants.

Article IV, Section 17, Florida Constitution, established a Board of Commissioners of State Institutions and provided that "such board shall have supervision of all matters connected with such institutions in such manner as shall be prescribed by law."

It will be noted there is nothing in these constitutional provisions expressly providing that the board should establish prisons; and it affirmatively appears that its supervision of such an institution or institutions is prescribed by law.

There appears to be nothing in the constitution or laws of Florida contemplating the right of the state to detain "adult delinquents." Thus, it would seem that the question is applicable to colored female state prisoners, adults and minors, and colored female delinquent children.

The legislature of Florida, under the above constitutional mandate and authority, (Section 954.01, Florida Statutes, 1941) required the board to establish a state prison for the safekeeping and punishment of prisoners; and further provided (Section 954.02, Florida Statutes, 1941) that a state prison farm should be established on lands owned by the state in Bradford county, and that the board should "improve said farm for the purpose of the care and maintenance of the women and infirm male convicts . . . and such other convicts as said board may from time to time place on said state prison farm." Section 954.03, Florida Statutes, 1941, provides that the "prison farm herein provided for shall be known as, and for all purposes be, the state penitentiary of Florida."

That is the only penitentiary we have, and that is the only penitentiary or correctional institute to which any convicted felon, black or white, male or female, may be sent, other than in those instances, and as provided by Section 415.17 when a child less than eighteen may be sent to one of the two established industrial schools for delinquents. Under circumstances permitted by law, state convicts may be sent away from the prison farm to perform labor in connection with public works (e.g., Sections 952.07, 952.10, 952.12 and 954.45, Florida Statutes, 1941, and Section 952.23, 1945 Supplement to Florida Statutes, 1941). When such is done, and such labor requires removal from the prison farm to a distant point, it is contemplated that such convicts so engaged in such public work shall there be housed and detained. Therefore, it would seem that the state prison established by the legislature consists of the State Prison Farm and those prison camps or other places of detention of prisoners used in public work apart from the prison farm. (See *Ex parte Green* (Fla.), 157 So. 333). Beyond this, the legislature has made no further provision for a state prison.

The legislature has also provided the Florida Industrial School for Girls, a correctional institution, in Marion county near Ocala (Chapter

956, Florida Statutes, 1941). The legislature has further provided for the handling of dependent or delinquent children in Florida (Chapter 415, Florida Statutes, 1941, as amended; Chapter 416, Florida Statutes, 1941; and in certain of the larger counties by special legislation creating juvenile courts). A reading of these laws will evidence when a child under eighteen may and may not be sent to the state prison for commission of a felony, and circumstances under which such a child may be sent to the state prison; and the circumstances under which a delinquent female child may be committed to such industrial school for girls. Laws for dependent and delinquent children apply with equal efficacy, of course, to both races. And there is nothing in the law providing for Florida Industrial School for Girls, designating it as an institution for white girls only. The legislature has made no further provision for a state detention institution for delinquent girls.

In view of the foregoing, in my opinion the above questions are properly answered in their numbered order as follows:

(1) There appears to be no constitutional or legislative authority for the commitment of colored female felons to any penal or correctional institution in Florida other than the state prison, as now established. If the facilities at the State Prison Farm are inadequate for the housing, handling and detention of colored female felons, within the funds which may be available the state may provide an additional building or buildings at said place to meet such need.

(2) The only state institution for the detention of female delinquent children is the Florida Industrial School for Girls. If the facilities at such institution are inadequate for the housing, handling and detention of colored female delinquent children, the state may, within the funds which may be available, provide an additional building or buildings at said place for such purpose.

Thus, it is my opinion that any plan contemplating a new institution for the detention of colored female prisoners, adults, and minors, and colored female delinquent children, apart from institutions now established, as aforesaid, would require legislative authority.

STATE PRISON FARM

September 14, 1946.—046-388.

PRISON FUND—RECEIPTS

QUESTIONS: 1. In what fund in the state treasury should collections of delinquent taxes, which were assessed pursuant to Section 4, Chapter 7833, Laws of Florida, Acts of 1919, be deposited?

2. May the above moneys, when deposited in the state treasury, be expended under any existing appropriation or must they be held subject to future appropriations by the State Legislature?

To Honorable J. M. Lee, Comptroller:

Section 4, Chapter 7833, Acts of 1919, provided for the levy and collection of a state tax on all property liable to assessment in the State, and further provided that "all moneys derived from such levy shall be paid into the state treasury to go into a fund to be known as 'State Prison Fund'." This state tax levy was abolished by the amendment of Section 2, Article IX, of the State Constitution in 1940. The above provision for a state levy having been abolished by the constitution, the same was omitted from the Florida Statutes, 1941, for that reason. (See Section 952.09, Florida Statutes, 1941, and history and revision notes thereto). Section 954.20, Florida Statutes, 1941, provides for the commissioner of agriculture to submit estimates, to the board of commissioners of state institutions, for the maintenance of the state prison from month to month, and

directs that such estimated expenses, when approved by the board, be paid "out of the moneys in the treasury **not otherwise appropriated.**" This section seems sufficient as an appropriation of moneys from the state treasury. (59 C.J. 231, Section 377). See also Sections 16.23, 116.01 and 193.44, Florida Statutes, 1941, which may have some bearing upon these questions.

Where taxes are levied under a law which is repealed by subsequent legislation, unless it clearly appears that the legislature intended the repeal act to work retrospectively, it will be assumed that it intended the taxes to be collected according to the law in force when they were levied. (2 Cooley on Taxation 1181 et seq., Section 538; 61 C.J. 1012, Section 1292.)

Similar questions were involved in opinions of this office under dates of May 23, 1946 (046-233) and April 19, 1946 (046-159), to which reference is hereby made.

Answering the above two questions. I am of the opinion that the first question should be answered by stating that the moneys in question, when collected, may continue to be deposited in the fund heretofore carried under the name of "State Prison Fund." The second question should be answered by stating that such moneys may be expended under the provisions of Section 954.20, Florida Statutes, 1941, above quoted from.

October 2, 1946.—046-420.

SUPERINTENDENT—DUTIES—DISCIPLINE

QUESTION: A year ago it was necessary to confine a prisoner in the flat top to prevent him from unlawfully practicing law for other prisoners, such confinement being resorted to only after he had repeatedly violated his promises to quit such unlawful practice. He has done no work for a year, although sentenced to hard labor, and has applied himself to the practice of law in his own behalf. He defies the prison authorities in many ways. Does the superintendent of the state prison have the authority to remove from said prisoner law books accumulated by him, and lock them up until said prisoner's release?

To Honorable L. F. Chapman, Superintendent, Florida State Prison, Raiford, Florida:

Section 954.29, Florida Statutes, 1941, relating to the duties of the Superintendent of the state prison, provides as follows:

"All necessary means shall be used by the superintendent, and such punishment as may be needful shall be adopted, to maintain order, enforce obedience and discipline, suppress insurrections, prevent escapes and compel the performance of labor; but no cruel or inhuman punishment shall be inflicted upon any prisoner, and no punishment injurious to the mind or body of the prisoner shall be permitted, nor shall any prisoner be compelled to labor without food."

It is my opinion that said statute authorizes the superintendent to remove said prisoner's law books from him if it is necessary to maintain order, or to enforce obedience and discipline, or to compel him to perform labor; and that the superintendent has the right to deprive said prisoner of his law books so long as it is necessary to accomplish said objectives.

May 24, 1946.—046-220.

TRANSMITTAL OF INDICTMENT—COUNTS

QUESTION: Under Section 954.27, Florida Statutes, 1941, when any person has been convicted of any criminal offense and is sentenced to serve any term in the State Prison, you are required to transmit to the

commissioner of agriculture with the commitment of such person, a certified copy of the indictment or information upon which such person shall have been convicted. May you transmit to the commissioner only a certified copy of the count or counts upon which the defendant was convicted and omit other counts of the information or indictment?

To Honorable W. Cecil Watson, Clerk of the Criminal Court, Dade County, Miami, Florida:

In my opinion it will be necessary for you to transmit a certified copy of the entire information or indictment.

I am aware of the fact that this will cause additional expense, and may appear useless, but the legislature saw fit to require the entire information or indictment transmitted and I feel this should be done.

FLORIDA INDUSTRIAL SCHOOL FOR BOYS

December 28, 1945.—045-397.

COMMITMENT TO EVIDENCE ALTERNATIVE SENTENCE

QUESTION: When a child under eighteen years of age is sentenced to Florida Industrial School for Boys under the circumstances and as authorized by Section 415.21, 1943 Supplement to Florida Statutes, 1941, and the commitment does not evidence the alternative punishment provided by said law, what is the proper action to be taken by the Superintendent of said institution with respect to such child so sentenced?

To Honorable John T. Wigginton, Secretary, Board of Commissioners of State Institutions:

It is noted that Section 955.20, Florida Statutes, 1941, was repealed by Chapter 21895, Laws of Florida, Acts of 1943. The applicable law now appears to be Section 3 of said Chapter, which has been designated Section 415.21, 1943 Supplement to Florida Statutes, 1941.

Section 415.21 sets forth the disposition to be made by the court of a child less than eighteen charged with crime. Among other things, the court "may sentence him to a Florida industrial school or to such other punishment provided by law for the same offense." Quoting further from this Section:

"If (sentenced) to a Florida industrial school, the sentence shall be conditioned that if such person is not received or kept there for the term of his sentence, unless sooner discharged by the board of commissioners of state institutions, or if such person is found to be incorrigible or incapable of reformation, he shall then suffer such alternative punishment as the court may designate in such sentence."

It is apparent the statute contemplates that the alternative punishment shall be such as the court shall designate in the sentence imposed by the court at the time such child is committed to Florida Industrial School for Boys. It would seem that the provisions of this section mandatorily require the court, in sentencing such child to Florida Industrial School for Boys, to condition such sentence as provided in the quoted part of said Section 415.21. The form of commitment provided by the statute contemplates that the terms of such alternative sentence shall appear therein. Section 958.01, Florida Statutes, 1941. And there should be attached to the commitment a copy of the charge upon which the person is committed. Section 958.02, Florida Statutes, 1941.

Our court held in *Cooper vs. State*, 83 Fla. 34, 90 So. 693, that where a commitment issued under Section 6318, R.G.S. 1920 (same as above Section 955.20) erroneously described the offense of which the defendant was convicted, the case should be reversed for the purpose of amending

the commitment to make it speak the truth. It would seem just as appropriate that where a commitment fails to evidence the alternative sentence required by said Section 415.21 and as contemplated by said Section 958.01, it should be amended.

It is the general rule that where a trial court has legally imposed a sentence and the term at which it was imposed has passed, the power of the trial court over such sentence is ended. *Tanner vs. Wiggins*, 54 Fla. 203, 45 So. 459. However, our supreme court has held on numerous occasions that where the proceedings in a criminal case are free from error but for the imposition of an **unauthorized** sentence, the judgment may be reversed and the cause remanded for proper sentence. *Hunter vs. State*, 64 Fla. 315, 60 So. 786; *Brooke vs. State*, 99 Fla. 1275, 128 So. 814; *Canala vs. State*, 147 Fla. 500, 2 So. 2d. 859. And on this point particular attention is directed to the case of *Blackwelder vs. Morris, Sheriff*, 89 Fla. 87, 103 So. 124. In such case the court in sentencing Blackwelder, failed to impose a fine and jail sentence as required by statute, and in habeas corpus proceedings, the court remanded Blackwelder for proper sentence. It appears evident that such omission of the trial court resulted in a void judgment, since the proceedings employed constituted a collateral attack on such judgment. Therefore, it would seem that a trial court, after due proceedings, could impose a lawful sentence in event of a prior illegal sentence, even though the term at which the illegal sentence was imposed has expired.

In view of the foregoing, it appears that the above question properly is answered as follows:

(1) The superintendent of Florida Industrial School for Boys may refuse to accept a child committed to such institution under the authority of above Section 415.21, unless the commitment issued and delivered with respect to such child shall evidence the conditioned sentence of such child to said institution, as required by said law.

(2) If a child has been properly sentenced under said Section 415.21 (or under said Section 955.20, if prior to the effective date of said Chapter 21895) and hitherto the child has been received at such institution, but the commitment delivered with respect to such child does not evidence the alternative sentence required by said Sections, the commitment should be corrected. In such an instance, the prosecuting officer of the court in which the child was sentenced should be advised by the superintendent of such institution of such deficiency and requested to make due application to such court for an order requiring issuance of proper commitment.

(3) If a child, heretofore received at the institution, was committed thereto by a court under said Section 415.21 (or under said Section 955.20, if prior to the effective date of said Chapter 21895), and the court failed to impose the alternative sentence required by such laws, a proper sentence should be entered with respect to such child. In such an instance, it would seem proper for the superintendent of said institution to call such deficiency in the sentence to the attention of the prosecuting officer of said court, with request that appropriate proceedings be instituted for entry by the court of sentence in pursuance of law.

February 10, 1945.—045-34.

NONRESIDENT—ADMISSION

QUESTION: What provision, if any, is made in the statutes governing the Florida Industrial School for Boys, with respect to admission of nonresidents?

To Honorable John T. Wigginton, Secretary, Board of Commissioners of State Institutions:

It appears that the inquiry derives from the following situation:

Attached to your letter is a letter from the clerk of the criminal court of record of Palm Beach county. It appears from said letter that a boy, aged 15, was convicted in said court of the crime of larceny of an automobile; that this boy has been refused admission to the Florida Industrial School for Boys for the reason that he is a nonresident of Florida; that it is the desire of the judge of said court and of the clerk that the board grant special permission for this boy to be admitted to such institution.

The above question is answered as follows:

I find no statutory provisions making residence a prerequisite to the admission of a boy to such institution.

INDUSTRIAL SCHOOL FOR GIRLS

August 29, 1946.—046-356.

DAIRY FUND—FIVE FUNDS ACT

QUESTION: Does the dairy fund at the Florida Industrial School for Girls come under the Five Funds Act?

To Honorable Terry C. Lee, Budget Director:

In my letter to the governor of November 7, 1945, covering the application of the Five Funds Act to all of the State agencies I find that I therein held that the dairy fund at the Florida Industrial School for Girls did not come within the purview of the Five Funds Act. On further consideration I am of the opinion that the dairy fund is covered by the Five Funds Act and that fund should be deposited in the state treasury. Moneys in that fund should go into the incidental fund of the institution and is usable by the institution in the same manner as incidental funds of other State institutions.

Note: This opinion amends Opinion No. 045-353, dated November 7, 1945. The amended opinion in its printed form has been corrected accordingly.

INDUSTRIAL PLANTS IN STATE INSTITUTIONS

September 10, 1946.—046-391.

BRICK PLANT—PURCHASE—FUNDS

QUESTION: The Board of Commissioners of State Institutions adopted a resolution of August 13, 1946, for the purchase of a brick plant at Chattahoochee, Florida, to be operated at Florida State Hospital, to produce brick to be used in the state building program contemplated by Chapter 22820, Laws of Florida, Acts of 1945, such resolution providing the further matters set forth below herein. On August 27, 1946, the board authorized and directed payment of invoices incurred in connection with said brick plant, "which has been made a part of the operations of Florida State Hospital," from the special maintenance fund of said institution, and has advised the Comptroller of Florida of such action. Is there any authority of law authorizing the comptroller to honor requisitions upon said fund for payment of such invoices incurred as above set forth?

To Honorable J. M. Lee, State Comptroller:

It is assumed at the outset that there is sufficient money in the special maintenance fund of Florida State Hospital to equal the aggregate of any such invoices which might be represented.

In its resolution of August 13, 1946, among other things, the Board of Commissioners of State Institutions determined that brick necessary for the state building program are not available on the market and that

there is no assurance they can be had from commercial sources in quantities as such are required; that contractors either refuse to bid or bid excessively high prices on state building construction because of uncertainty of the brick supply; that essential progress in the state's construction program is not possible without such material; that it is expedient and necessary that for the board to purchase and operate a brick plant as a temporary expedient until such time as private sources may adequately and reasonably supply the needs of the state; that the brick so produced shall be used exclusively for state purposes and not in competition with private industry; and that the plant offered for sale to the board will manufacture bricks needed to accomplish the purposes of the state building fund act.

It seems apparent that the board did not purport to acquire this plant under the provisions of Section 959.01, Florida Statutes, 1941, (and in this connection, see Revision note. Section 959.01, Vol. 2, page 1079, Florida Statutes, 1941). The authority of the board to acquire and operate such plant would seem to derive from said Chapter 22820, and the provision therein that the board should "do and perform all things necessary" to accomplish the purposes of such act. In effect, the board has determined that it cannot proceed with such program unless it produces brick for use therein, for the reasons and findings incorporated in said resolution of August 13, 1946. Thus, it would seem that in view of these findings and the legislative injunction that the board should do all things necessary to accomplish the state building program, its authority to acquire and operate said plant, as contemplated by said resolution, derives from said Chapter 22820.

Since the brick plant may not be established as an industrial plant under the provisions of original Section 1, Chapter 2663, Laws of Florida, Acts of 1927, (now in its deleted form Section 959.01, Florida Statutes, 1941), and since there appears to be no other law authorizing the operation of such a plant at Florida State Hospital, grave doubt exists that funds appropriated for the use of that institution may be employed for the purchase or maintenance of such plant. While certain of the products of said plant may be essential to construction at the State Hospital, obviously the state building program is not limited to such institution.

The special maintenance fund of said institution is composed of those moneys contemplated by Section 3, Chapter 22827, Laws of Florida, Acts of 1945, which provision of law authorized the board to expend said moneys at such institution as the board may direct. Any use of such funds at the institution by the board would be required to be for a purpose authorized by law. However, the board may subject such funds to the "balances" contemplated by Section 2 of said Chapter 22820, if the board determines that such funds are not needed at the institution for current improvements and if such funds have not been appropriated to some contract hitherto entered into by the board. State ex. rel. Caldwell, Governor, et al. vs. Lee, Comptroller, Opinion issued and filed by Supreme Court of Florida, July 19, 1946. Once the board of commissioners has made such determination and the budget commission has ascertained that all or any part of such funds is a "surplus" or "balance," within the meaning of Section 2 of said Chapter 22820, the same may be set over and become a part of the state building fund, as provided by Section 2 of said Chapter 22820. Even though no part of said special maintenance fund is covered into the state building fund, it would seem that the cost of the acquisition and/or maintenance of said brick plant is chargeable to and payable from the state building fund.

In view of the foregoing, in my opinion the above question properly is answered as follows:

(1) The cost of acquisition and/or maintenance of the aforesaid brick plant at Chattahoochee, Florida, is properly chargeable to and payable out of the state building fund.

(2) Since grave doubt exists that said items of cost properly are payable out of the special maintenance fund of Florida State Hospital, the position is here assumed that such would not be authorized.

(3) Under the conditions set forth in the case of *State ex rel. Caldwell, Governor, et al. vs. Lee, Comptroller, supra*, and referred to above, all or any part of such Special Maintenance Fund may be determined to be a "surplus" or "balance" and may be set over and become a part of the state building fund in the manner and as contemplated by Section 2 of said Chapter 22820.

September 19, 1946.—046-399.

NONRESIDENTS—COMMITMENT TO INSTITUTIONS

QUESTION: May the Board of Commissioners of State Institutions permit commitment to the state industrial institutions of children who are not legal residents of Florida, provided all attempts to effect return of such children to their respective home communities have failed?

To Honorable John T. Wigginton, Secretary, Board of Commissioners of State Institutions:

There is nothing in our statutes relating to such institutions which prohibits commitments to such institutions of delinquent children who are not legal residents of Florida. The nearest approach to such a statutory limitation is found in Section 955.19, Florida Statutes, 1941, (adopted originally as Section 9 of Chapter 5588, Laws of Florida, Acts of 1905), providing that, under the circumstances set forth therein, a circuit judge or county judge may commit a person over ten and under eighteen years of age "residing in his jurisdiction," to the guardianship of the Industrial School for Boys, and under Section 956.02, Florida Statutes, 1941, the same procedure would be applicable with respect to girls. However, the provisions of Chapter 415, Florida Statutes, 1941, relating to instances when delinquent children may be committed to these institutions contain no limitations as to legal residence. Indeed, grave doubt exists that any regulation of the board limiting the commitment of delinquent children charged with crime under Section 415.21, to legal residents, would be effective if challenged.

In view of the foregoing, in my opinion the above question properly is answered as follows:

Said question is answered in the affirmative, that is to say, that the Board of Commissioners of State Institutions may permit commitment to the state industrial institutions of delinquent children who are not legal residents of Florida. It is here pointed out that no attempt is made in this opinion to resolve the question of whether or not the board could lawfully prevent the commitment to such institutions, under either Section 415.20 or 415.21, of delinquent children who are not legal residents of Florida.

CHAPTER XXXIX

CONSTITUTION OF FLORIDA

DECLARATION OF RIGHTS

March 8, 1946.—046-87.

RIGHT-TO-WORK AMENDMENT—UNIONS

QUESTIONS: 1. What legal right supports the musicians union in threatening to remove union musicians from employment at the hotel as above shown?

2. What recourse does the hotel have in such a case as above shown when he refuses to discharge the nonunion employees?

To Honorable J. Lee Ballard, Hotel Commissioner:

1. There is no legal right supporting the musicians union in the demand so made. On the contrary, in the making of such demand, the union is violating the amendment to Section 12 of the bill of rights of the constitution of the State of Florida, that was added by popular vote in the general elections of November, 1945, known as the right-to-work constitutional provision. The union is also violating Section 833.02, Florida Statutes, 1941, in making this demand.

2. As to what recourse the employer may have legally if he refuses to discharge the nonunion employees, depends entirely upon what action is taken or what occurs subsequent to such refusal. But the employer is, in my opinion, evidencing not only his good citizenship, but his fair-mindedness to his employees and his desire to promote the welfare and interests of such employees, union and nonunion alike, by refusing to meet any such illegal demand, and he is secure in knowing that he does have the protection of the law in Florida against whatever damage is done him and his business by the person or persons so interfering with his lawful operations as to attempt by the union strangulation and boycott process to coerce only union employment.

This office will cooperate with your department in affording any hotel operator in this state the protection of our laws in matters of this kind and cases of this kind, where employers are being forced to employ only union employees.

August 27, 1945.—045-265.

UNION SHOP CARDS—DISPLAY

QUESTION: Does the display of union shop cards, which must be displayed in all union barber shops in the City of Jacksonville, violate Section 12 of the declaration of rights of the Florida Constitution, the so-called right-to-work amendment?

To Honorable R. C. Riddle, Executive Secretary, Florida State Hotel Association, Inc., Jacksonville, Florida:

Rules governing the union shop cards say, in effect, that such cards shall not be displayed in any barber shop unless the operators, or the barbers, therein, are members of the Journeymen's International Barber Union of America and in good standing and not members of any other organization of barbers. Nor shall the card be displayed in a shop where nonunionists are employed.

The purpose of such a rule is obvious: that such a shop shall not have therein any operator or hire any barbers who are not members of this barbers' union and the card is to coerce the carrying out of this purpose. Regardless of the method employed, if the effect of such is to deny or abridge the right of persons to work on account of nonmembership in any labor organization, (and, in my opinion, this has that effect), it violates the said Section 12 of the declaration of rights of the Florida Constitution.

In support of this opinion, I might state that the courts of Florida are free to deal with this violation, for:

(a) Barber shops are directly related to the health and welfare of the people, as evidenced by legislative act in setting up a control commission, and as further evidenced by the decision of our supreme court sustaining the validity of that act. They are, therefore, directly subject to the police power of the state.

(b) Barber shops are not engaged in interstate commerce, nor do they affect directly or indirectly the flow of commerce, hence the shop and its employees are beyond the jurisdiction conferred by the National Labor Relations Act, and remain subject to the police powers of the state.

(c) Such shops are likewise not engaged in war work or in any of the industries under the jurisdiction of the National War Labor Board, and hence the state is free to enforce its police regulations without collision with that jurisdiction.

(d) The right-to-work amendment to the Florida Constitution can therefore apply, with no conflict with any federal act embracing this subject.

March 8, 1946.—046-93.

REAL PROPERTY—ALIEN OWNERSHIP

QUESTION: Is the purchase of real estate in Florida by aliens prohibited or restricted by state law?

To Honorable Everett T. Swalm, Florida State News Bureau, Tallahassee, Florida:

Section 18 of the declaration of rights of the Florida Constitution provides as follows:

"Section 18. Foreigners who are eligible to become citizens of the United States under the provisions of the laws and treaties of the United States shall have the same rights as to the ownership, inheritance and disposition of property in the state as citizens of the state, but the legislature shall have power to limit, regulate and prohibit the ownership, inheritance, disposition, possession and enjoyment of real estate in the State of Florida by foreigners who are not eligible to become citizens of the United States under the provisions of the laws and treaties of the United States."

Under the provisions of this section aliens who are eligible to become citizens of the United States according to the laws and treaties of the United States are guaranteed the same rights that are enjoyed by citizens of Florida to purchase property in this state. The legislature is empowered to prohibit or restrict the purchase of real estate in this state by aliens who are not eligible to become citizens of the United States but this power has not been exercised by the legislature.

Therefore, it is my opinion that your question should be answered in the negative.

March 2, 1946.—046-94.

LOCAL LAW—WHEN PROHIBITED

QUESTION: Chapter 21189, Special Acts of 1941, created a tenth voting precinct in Dixie County, Florida, which has never been recognized. Should the board of county commissioners recognize it, or let the electors therein petition the board to recognize it?

To Honorable Cauley C. Copeland, Clerk of the Circuit Court, Dixie County, Cross City, Florida:

I do not pass upon the constitutionality of this said special law. I would refer you to Article III, Section 20 of our constitution, which says:

"The legislature shall not pass special or local laws in any of the following enumerated cases: that is to say, . . . for designating the places of voting . . ."

and to Section 98.23, Florida Statutes, 1941, wherein the legislature seems to define the word "precinct" to mean the same as a voting place.

If this said law could be held constitutional, it is my opinion that the county commissioners should take notice of same as it would be binding upon them and those electors living within the said designated precinct, if they desire to vote, should qualify therein.

JUDICIAL DEPARTMENT

December 20, 1946.—046-520.

COUNTY ATTORNEY—TERM OF OFFICE

QUESTION: Do the words "county solicitors" as used in Article V, Section 47, Florida Constitution, include the county attorney in and for Jackson county, Florida, whose office was created under Chapter 18609, Laws of Florida, Special Acts of 1937?

To Honorable R. A. Gray, Secretary of State:

A study of the provisions of the above special act, and also the comments of our supreme court concerning the office thereby created in sustaining the act (*State vs. Garrett*, 178 So. 309) leads to the conclusion that such county attorney in and for Jackson county is not included in the words "county solicitors," as such words are used in Article V, Section 47, Florida Constitution.

Hence, it is my opinion that the commission to be issued to the person elected as such county attorney at the 1946 general election in Jackson county should be for the four-year term beginning on the first Tuesday after the first Monday in January, 1947.

SUFFRAGE AND ELIGIBILITY

June 8, 1945.—045-138.

PERSON CONVICTED UNDER FEDERAL STATUTE—CIVIL RIGHTS

QUESTION: Is "A" deprived of his civil rights by reason of his conviction, on April 10, 1938, of violating 12 USCA, Section 592, for which he received a sentence of five years in the Federal Penitentiary?

To the State Board of Pardons:

12 USCA, Section 592, relates to embezzlement and allied offenses committed by officers, agents, directors, employees, receivers and others connected with Federal Reserve Banks, member banks, and kindred

institutions. Said section specifically states that a violation thereof is a misdemeanor. The determination of whether "A" lost his civil rights by virtue of his conviction under this federal statute must be arrived at by reference to the pertinent provisions of the State Constitution and statutes.

Article VI, Section 4, of the Florida Constitution says in part:

"... nor shall any person convicted of **felony** by a court of record be qualified to vote at any election unless restored to civil rights." (Emphasis supplied).

Section 98.01 (4), Florida Statutes, 1941, is to the same effect. Article XVI, Section 25 of the Constitution, defines the term "felony" as follows:

"The term **felony**, whenever it may occur in this constitution or in the laws of the state, shall be construed to mean any criminal offense punishable with death or imprisonment in the state penitentiary." (Emphasis supplied).

"A's" offense not having been punishable by death or imprisonment in the state prison of Florida, neither Article VI, Section 4, of the Constitution, nor Section 98.01 (4) of the statutes operated to deprive him of his right to vote.

Article VI, Section 5, of the Florida Constitution provides that "the legislature shall have power to and shall enact the necessary laws to exclude from every office of honor, power, trust or profit, civil or military, within the state, and from the right of suffrage, all persons convicted of bribery, perjury, larceny, or of infamous crime."

In my opinion this provision is not self-executing. Rather, it imposes a duty on the legislature to enact the necessary laws to carry the section into effect. Pursuant to this duty, the legislature has enacted Sections 40.01 (2), 90.07, 98.01 (4) and (5), and 112.01, Florida Statutes, 1941.

Section 40.01 (2) prescribes that no person who shall have been convicted of bribery, forgery, perjury or larceny, or any felony, unless restored to civil rights, shall be qualified to serve as a juror. "A" was not convicted of either bribery, forgery, perjury, or larceny. Neither was he convicted of felony within the constitutional definition set out in Article XVI, Section 25, or within the terms of 12 USCA, Section 592, under which he was convicted. Therefore, he did not lose his right to serve as a juror by reason of his above mentioned conviction.

Section 90.07 says that a conviction of perjury shall make incompetent any person to testify in any court in this state. Since "A's" offense was not perjury, this section did not deprive him of his right to be a witness.

Section 98.01 (4) says that a person shall not be entitled to vote who may have been convicted of any felony by any court of record. "A" was not convicted of a felony within the constitutional definition laid down in Article XVI, Section 25, or within the terms of 12 USCA, Section 592. Therefore, paragraph (4) of Section 98.01 did not deprive him of his right to vote.

Section 98.01 (5) provides that a person shall not be entitled to vote who may have been convicted of bribery, perjury, or larceny or of any infamous crime in any court of this state or any other state. "A" was not convicted of bribery, perjury, or larceny. Was he convicted of infamous crime?

In 22 Corpus Juris Secundum 54, headnote to Paragraph 3, the rule as to what constitutes an infamous crime is laid down as follows:

"An infamous crime is one which works infamy in the person committing it; one which involves moral turpitude and disqualifies the person convicted thereof as a witness. In general it is a crime which is punishable by death or imprisonment, with or without hard labor, in a state prison, and it is the authorized punishment, and not the punishment actually inflicted, which is the determining factor." (Emphasis supplied).

In 14 American Jurisprudence 755-756, Paragraph 4, the rule as to what constitutes an infamous crime is said to be as follows:

"According to the generally accepted modern view, a crime punished by imprisonment in the state prison or penitentiary, whether the accused is or is not sentenced to hard labor, is an infamous crime, and in the determination of this, the question is whether it is one for which the statute authorized the court to award an infamous punishment, and not whether the punishment actually imposed is an infamous one." (Emphasis supplied).

In 14 American Jurisprudence, p. 756-757, Paragraph 4, we find the further statement that:

"Misdemeanors, generally, are not infamous crimes. They are, however, if one convicted thereof is subject to an infamous punishment, or if they are determined infamous by statute."

According to the foregoing authorities, it appears to be the generally accepted modern view that a crime is not infamous unless it disqualifies the convict as a witness and is punishable by imprisonment in the state prison. "A" was not convicted of an infamous crime, and did not lose his right to vote by virtue of Section 98.01 (5).

The question of what constitutes an infamous crime within the meaning of the provision of Section 8 of the declaration of rights of the state constitution of 1868 that "no person shall be tried for a capital or otherwise infamous crime . . . unless on presentment and indictment by a grand jury," was considered by the Supreme Court of Florida in the case of *King v. State*, 17 Fla. 183. An information was filed charging King with keeping a house of ill fame. King contended that said Section 8 of the declaration of rights required the charge to be made by indictment, because it was an infamous crime. The supreme court decided that the offense was not a infamous crime so as to require that it be prosecuted upon indictment, and in so holding pointed out that the offense was a misdemeanor which was not mentioned in the then existing statute prescribing the grounds which disqualified a person from being a witness. It appears that the court based its determination of what constitutes an infamous crime upon the question of whether the crime was one which would debar a person from serving as a witness. Perjury is the only ground for disqualification of a witness laid down in our statutes. See Section 90.07, Florida Statutes, 1941. "A's" offense not being perjury, the *King* case is authority for the position that he was not deprived of his right to vote on the ground of conviction of an infamous crime.

In the case of *Adams v. Elliott*, 128 Fla. 79, 174 So. 731, the Supreme Court of Florida considered the question of whether a juror was disqualified by reason of his conviction of the misdemeanor of accepting fees illegally while he was a justice of the peace. In this case the supreme court apparently used the terms "infamous crime" and "felony" interchangeably. We quote the following statement from the opinion, to wit:

"Where the offense is not considered as a felony but as a misdemeanor only, it will not be considered as an infamous crime, requiring infamous punishment."

In my opinion, the foregoing statement from the case of *Adams v. Elliott* is in conformity with the general authorities quoted above, and requires the holding that "A's" offense was not an infamous crime because it was a misdemeanor.

Section 112.01 provides that all persons convicted of bribery, larceny, perjury, or any other infamous crime, shall be excluded from every office of honor, power, trust or profit, and from the right of suffrage. "A" was not convicted of bribery, larceny or perjury. For the reasons stated in our discussion of the effect of Section 98.01 (5), *supra*, I do not think that he was convicted of an infamous crime.

My conclusion is that "A" lost none of his civil rights as a citizen of Florida by reason of his conviction of misdemeanor under the above mentioned federal statute.

TAXATION AND FINANCE

March 28, 1946.—046-112.

WIDOWS AND DISABLED PERSONS—EXEMPTIONS

QUESTION: Are widows and persons who have lost a limb or been disabled in war or by misfortune, who are entitled to five hundred dollar exemption from taxation, as provided by Section 9 of Article IX of the Constitution of Florida, entitled to claim the said exemption on real property after the said property has been assessed for taxes and after the taxes become payable when said real property has not been returned for taxation and where there has been no prior claim for the exemption?

To Honorable Cecil A. Rountree, County Attorney, Chipley, Florida:

In the absence of any law to the contrary, it is my opinion that the said exemption should be allowed.

August 5, 1946.—046-334.

STATE FUNDS—FEDERAL LOANS—DISBURSEMENT

QUESTION: Under the provisions of Chapter 22821, Laws of Florida, 1945, and the construction placed upon the statute by the Supreme Court of Florida, is a United States treasury warrant made payable to the State Improvement Commission endorsed in blank by the commission representing an advancement by the United States Treasurer to the Florida State Improvement Commission upon a loan for the purpose of creating plans for a central heating plant for the capitol center and the Florida A & M College properly deposited in and disbursed from the state treasury as provided by Section 24, Article IV of the constitution?

To Honorable J. M. Lee, State Comptroller:

The Supreme Court of Florida in *Watson v. Caldwell*, 23 So. 2d 855, in construing Chapter 22821 pronounced its decision in the following language:

"In this connection it is further contended that Section 3 of Chapter 22821 contravenes Section 4, Article 9 of the constitution, providing that 'no money shall be drawn from the treasury except in pursuance of appropriations made by law.'

"The answer to this contention is that the funds involved in this act are not funds 'from the treasury', as contemplated by Section 4 of Article 9. The state treasurer is holder and dispenser of these funds but is merely their custodian and does not hold them as state treasurer. The Mayor of Tallahassee could have as appropriately been designated."

In the same opinion the supreme court further decided:

"The commission however derives its revenues from rentals on projects it constructs, from grants by congress and other sources and from appropriations by the state. The revenues of the commission are held in trust for the state to be used as Chapter 22821 directs, that is to say to pay for projects constructed, and holders of its obligations have no recourse against the state or state funds whatever. Its funds may be withdrawn on warrants signed by the chairman of the commission and counter-signed by its secretary."

In a supplemental opinion rendered by the supreme court on February 8, 1946 (24 So. 2d 797), the supreme court held:

"In holding that moneys appropriated to the commission from the state treasury should be drawn in the manner provided by law, the court had no thought except that such funds should be drawn upon warrant or order of the comptroller, counter-signed by the governor, as provided by Section 24, Article 4 of the constitution. We are aware of no other means to withdraw money from the state treasury. It is quite true that Sections 4 and 6 of the act in question may be somewhat ambiguous on this point, but the mandate of the constitution is clear and no act of the legislature can displace that. So funds for the expense of the commission from the \$50,000 appropriated for that purpose are to be drawn and disbursed in the same manner that other funds are drawn from the state treasury."

Under the supreme court's decision construing this statute, the only moneys properly deposited in the state treasury to the credit of the Florida State Improvement Commission are those specifically appropriated by the statute for the purpose of defraying the expenses of the commission, which the statute under consideration fixed at the sum of \$50,000. This money is properly deposited in the state treasury and withdrawn therefrom upon warrant or order of the comptroller, counter-signed by the governor.

All other moneys derived from rentals, from grants by congress and from other sources are properly held and dispensed by the state treasurer, not in his capacity as state treasurer, but in his capacity as "ex officio treasurer of the commission", and "custodian of all moneys securities, and bonds belonging to the commission." These latter moneys are disbursed not upon warrant of the comptroller, but upon warrants signed by the chairman of the commission and counter-signed by its secretary. Your question is accordingly answered in the negative.

March 28, 1946.—046-115.

TRAILERS AND TRACTORS—TAXATION

QUESTIONS: 1. Are automobile trailers subject to ad valorem taxes under the laws of this state when they carry no current motor vehicle license tags and are permanently or semipermanently parked and used for living or housing quarters?

2. Are farm tractors, and other tractors which are not required, under the laws of this state, to procure motor vehicle license tags, subject to ad valorem taxes under the laws of this state?

To Honorable J. M. Lee, State Comptroller:

Motor vehicle trailers, which are suitable and primarily intended for use in connection with motor vehicles, are "motor vehicles" within the purview and intent of the provisions of Section 13, Article IX, of the

state constitution, although they may be temporarily used for other purposes (*Wood v. Club Transportation Service*, 143 Fla. 449, 196 So. 843).

Trailers which are not suitable nor primarily intended for use in connection with motor vehicles, and trailers which are primarily used for other purposes although suitable for use with motor vehicles (including semipermanent or permanent use as living or housing quarters), are not "motor vehicles" within the purview of Section 13, Article IX, of the state constitution. This class of trailers is personal property (unless attached to realty so as to become a part thereof) and should be taxed as such (61 C. J. 200, Section 171).

Trailers which have attached current motor vehicle license plates should be presumed as trailers intended for use with motor vehicles, although temporarily used for other purposes.

Farm tractors and similar vehicles, not within the purview of the above constitutional provision and the motor vehicle statutes, would not seem to be motor vehicles subject to license taxes (*Hart v. Stinson*, 135 Fla. 331, 185 So. 139, text 140), but should be considered as tangible personal property subject to taxation.

HOMESTEAD AND EXEMPTIONS

August 12, 1946.—046-344.

WIDOW'S OR DISABILITY EXEMPTION—ADDITION

QUESTION: Does Section 7, Article X, of the constitution as amended in 1938, limit the total allowable exemption on any dwelling to the value of \$5,000, thus preventing the taxing of a widow's or disability exemption of \$500, allowed by Section 9, Article IX, of the constitution, to a homestead tax exemption?

To Honorable J. M. Lee, State Comptroller:

Honorable Cary D. Landis, former attorney general, on January 22, 1935, held that a person entitled to the benefit of Section 7, of Article X, of the constitution, known as homestead exemption amendment, is also entitled to exemption as an ex-serviceman under Section 9, of Article IX, of the constitution, and on January 10, 1935, held that:

"The fact that the owner of a homestead receives the benefit of Section 7, of Article X, of the state constitution does not deprive him of any other exemption to which he may be entitled under the constitution or the laws of the state."

I concur in these two opinions.

I am aware of the fact that these two opinions were written prior to the 1938 amendment to said Section 7, Article X, when were added to this said amendment, among other words, these:

"But no such exemption of more than \$5,000 shall be allowed to any one person or any one dwelling house."

By using the words "such exemption," in my opinion, the electors did not intend to limit all homestead tax exemptions granted by the constitution to any one person or any one dwelling house, but only the exemption set forth in said Section 7, of Article X.

Therefore, in my opinion, your question should be answered in the negative.

July 27, 1946.—046-322.

SCHOOL SINKING FUND TAXES—HOMESTEADS

QUESTION: In a recent school district election held in your county,

some of your districts voted 2½ mills for the creation of a sinking fund. You desire to know if this sinking fund, since it was created by a vote, can be levied against homestead property?

To Honorable John W. Booth, Assessor of Taxes, Alachua County, Gainesville, Florida:

I gather from the records in the state office that this indebtedness for which the levy for the sinking fund was voted is made up of notes and time warrants issued by resolution pursuant to Section 1086, Chapter 19355, Acts of 1939; that the notes and warrants covered indebtedness which had accumulated prior to the making of the notes and time warrants and such indebtedness was for the maintenance of schools, teachers' salaries and the like, and the said notes and time warrants were issued after 1939, and of course, after the adoption of Section 10, Article VII of our constitution.

This section is legally operative for all taxes except for the payment of public bonded obligations incurred before amendment was adopted (*Groves vs. Board of Public Instruction, Manatee County, 109 Fed. 2d. 622*).

In my opinion, you are not authorized to levy the 2½ mills against homesteads which are exempt under Article VII, Section 10.

The mere fact that the sinking fund was created by a vote would not, in my opinion, affect this reasoning.

March 26, 1946.—046-109.

HOMESTEAD EXEMPTION—FISHING CAMP

QUESTION: Is the owner-operator of a fishing camp, not located within any incorporated municipality, consisting of the dwelling house of the owner-operator and several small cottages rented by the owner-operator to fishing parties, entitled to homestead exemption?

To Honorable James W. West, Attorney for County Commissioners, Bushnell, Florida:

The homestead exempted from taxation under Section 7, Article X of the constitution is the same homestead as that described in Section 1, Article X of the said constitution. Section 1, Article X of our constitution provides that "a homestead to the extent of one hundred and sixty acres of land . . . owned by the head of a family residing in this state . . . and the improvements on the real estate" shall be exempt. The constitution does not prescribe the manner in which the tract shall be used beyond residing thereon and expressly includes the improvements on the real estate. The only requirement is that there be not more than one hundred and sixty acres of land and that it be contiguous. The limitation to the owner's dwelling house and his business house is only applicable to homesteads in incorporated municipalities and has no application to homesteads outside of incorporated municipalities. The tax limitation to homesteads is five thousand dollars. (See Sections 1, 7 (Article X of the constitution; Section 192.12, Florida Statutes, 1941; *Armour & Co. v. Hulvey*, 73 Fla. 224, 74 So. 212, text 214; *McDougall v. Meginnis*, 21 Fla. 362, text 361.)

The above stated question should, therefore, be answered in the affirmative. This opinion has no application to homesteads within incorporated municipalities.

July 9, 1946.—046-294.

CITY LIMITS—ENLARGEMENT—TAX LIABILITY

QUESTION: Several years ago the city limits of Live Oak were changed whereby homes that were not in the city limits at the time

Article X, Section 7 of our constitution exempting homesteads from taxation came into effect were not in the said city. Can debt service and interest for bonds of the city of Live Oak, issued prior to the effective date of such law, be levied against these homesteads?

To Honorable H. H. Hair, Jr., Tax Collector, Suwannee County, Live Oak, Florida:

In my opinion, these homesteads are not liable for such debt service and interest.

The property was not in the city at the time the debt was incurred and the holders of such indebtedness have no right to look to property not in the city at the time the indebtedness was incurred.

This case has not been definitely decided by our courts but I would refer you to the cases of *Groves v. Board of Public Instruction*, 109 Fed. 2d. 522, and *Yowell v. Rogers*, 175 So. 772, which influenced me to reach this decision.

EDUCATION

April 17, 1945.—045-95.

SALE OF SCHOOL BONDS

QUESTION: May the State Board of Education lawfully sell bonds of the state school fund or bonds of any other fund under its supervision at private sale and without first advertising the bonds for sale and selling them to the highest bidder?

To Honorable Colin English, State Superintendent of Public Instruction:

Article XII, Section 3, of the constitution, defining duties of the State Board of Education, reads in part:

“... and shall have the management and investment of all state school funds under such regulations as may be prescribed by law . . .”

There are no statutory regulations as to the manner of sale of any bonds held by the State Board of Education. The method of sale is left to the discretion of the board. In any particular case, it is the duty of the board to select that manner of sale, whether by advertising, private sale, or otherwise, which in the board's opinion is most likely to produce the highest price. Your question is answered in the affirmative.

MISCELLANEOUS PROVISIONS

March 13, 1946.—046-97.

STATE SCHOOL SUPERINTENDENT—OTHER APPOINTMENT

QUESTION: Is the State Superintendent of Public Instruction eligible for appointment to the Everglades National Park Commission, while continuing to hold the office of and exercising the duties of State Superintendent of Public Instruction?

To Honorable Millard F. Caldwell, Governor:

My answer to your question is that the State Superintendent of Public Instruction is not eligible for such appointment because of the prohibition of Section 15, Article XVI of the Florida Constitution. I reach this conclusion for the following reasons:

1. Chapter 17275, Laws of Florida, Acts of 1935, which created the State Planning Board, attempted to authorize the appointment of two

state officials to the board. The act is analogous to the Everglades National Park Commission act (Chapter 264, Florida Statutes, 1941) in that both create an office, provide for the term thereof, define the duties of the members and delegate certain sovereign powers to them.

2. The Supreme Court of Florida in its advisory opinion to the governor, 1 So. 2d. 636, answering his question as to whether or not the secretary of state could legally qualify for appointment to the State Planning Board, made these pertinent remarks:

"We have considered the provision of Chapter 17275, Acts of 1935, and find that powers and attributes of sovereignty are delegated to or reposed in the State Planning Board The board is charged with certain duties to be performed, the purpose of which is to aid in the general welfare of the state It is authorized to expend public funds appropriated for that purpose in the discharge of its duties, exercising its own discretion The term of office of the members of the board are fixed by the act are required to be appointed by the governor Our conclusion is that a member of the State Planning Board, whose appointment is required to be made by the governor in the exercise of his own discretion and choice, is a state officer It, therefore, follows that under the provisions of Section 15 of Article XVI of the state constitution, which provides *inter alia*, 'and no person shall hold, or perform the functions of, more than one office under the government of this state at the same time', neither the secretary of state nor any other state officer is eligible for appointment as a member of the State Planning Board."

December 17, 1946.—046-510.

SCHOOL BOARD EMPLOYEE—COUNTY OFFICERS

QUESTION: An employee of the school board of your county is now a bus driver carrying school children on the regular route. He holds no other office under the school system and has no other connection with it. He has recently been elected county commissioner and in the normal course of things will take office on January 7th. Can he hold the office of county commissioner and still continue his duties as such bus driver?

To Honorable T. J. Swanson, County Attorney, Taylor County, Perry, Florida:

He does not, in my opinion, hold more than one office as prohibited by Article 16, Chapter 15, of the constitution, he being a mere employee of the school board and not delegated a portion of the sovereign power by reason thereof.

He is not prohibited by Section 234.20, Florida Statutes, 1941, as he is not a school official.

I, therefore, answer your question in the affirmative.

In this opinion I do not intend to give my approval to the wisdom of the policy of allowing one person to be county commissioner and such bus driver.

July 8, 1946.—046-293.

CONFLICT IN SECTION NUMBERS—PAROLE COMMISSION—AUTHORITY

QUESTION: Original Section 32 of Article 16 of the Florida Constitution, authorizing the legislature to create a parole commission em-

powered to grant paroles or conditional releases, was submitted to the electorate by 1939 Senate Joint Resolution No. 1001, and was adopted at the 1940 general election. Thereafter, 1941 House Joint Resolution No. 560 submitted to the electorate "an additional section to be known as Section 32 of said Article 16," dealing with the conservation of salt water fish and salt water products, and said additional Section 32 was adopted at the 1942 general election. What effect, if any, did the adoption of said "Additional Section 32" at the 1942 general election have upon the parole commission created by the legislature under authority of said original Section 32, and upon said commission's authority to grant paroles or conditional releases and to make investigations?

To Honorable Millard F. Caldwell, Governor:

Prior to the general election of 1940, there was no Section 32 of Article 16 of the Florida Constitution.

1939 Senate Joint Resolution 1001 submitted to the electorate original Section 32 of Article 16, which was adopted at the 1940 general election and which reads as follows:

"The legislature may create a parole commission empowered to grant paroles or conditional releases or probation under the official supervision to prisoners or persons charged with criminal offenses, and may provide for the qualification and method of selecting the commission members and for their term of office the length of which shall be wholly within the discretion of the legislature."

and, under the authority thereof, the legislature duly created a parole commission and empowered it to grant paroles and to make such investigations as might be necessary to carry out its duties (See Chapters 947-949, Florida Statutes, 1941).

1941 House Joint Resolution No. 560 submitted to the electorate "an additional section to be known as Section 32 of said Article 16," which resolution reads as follows:

"That Article Sixteen of the constitution of the State of Florida be amended by adding thereto an additional section to be known as Section 32 of said Article 16, authorizing the legislature to vest the power of making rules and regulations relating to conservation of salt water fish and salt water products in a board or commission, be and the same is hereby agreed to, and shall be submitted to the electors of the State of Florida for ratification or rejection at the general election to be held on the first Tuesday after the first Monday in November, 1942, as follows:

"Section 32. The legislature may vest in such board or commission, now created or that may be created by it, authority to make and establish rules and regulations without regard to uniformity of application, relating to the conservation of salt water fish and salt water products."

and the additional Section 32 set out in said resolution was adopted at the 1942 general election.

In my opinion, the adoption of "additional Section 32" at the 1942 election had no effect whatsoever upon the original Section 32 adopted at the 1940 general election, or upon the statutes enacted pursuant thereto.

Said additional Section 32 pertained to a subject entirely different from that dealt with in the original Section 32; and it will be noted that said 1941 House Joint Resolution No. 560, which submitted the additional Section 32, made no mention of amending or repealing the then

existing original Section 32; instead, said resolution proposed an amendment to the article (not to the original Section 32 thereof) by adding additional section to the 32 sections then embraced in said article.

Moreover, in giving the election notice required by law, the secretary of state gave notice under date of August 1, 1942, that at the 1942 general election there would be submitted for ratification or rejection:

"A JOINT RESOLUTION Proposing an Amendment to Article Sixteen of the Constitution of Florida, by adding thereto an additional section permitting the legislature to vest the powers of making rules and regulations relating to the conservation of salt water fish and salt water products in a board or commission."

Further, the official certificate of the state canvassing board, on file in the office of the secretary of state, shows that at the 1942 general election—

"Proposed Amendment to Amend Article XVI of the Constitution of the State of Florida by adding Section 32 with reference to the conservation of salt water fish and salt water products, was ratified."

It thus appears that the legislature submitted, the secretary of state gave notice of, and the people adopted, an amendment to Article 16 which added thereto an additional Section 32, without amending or repealing any of the theretofore existing 32 Sections of said article. This had the effect of enlarging Article 16 so that it now contains 33 sections, two of them bearing Number "32."

Through inadvertence, the legislature numbered both of said sections "Section 32," but this in no way detracts from the fact that both are in full force and effect. The only result of both sections having the same number is to make it necessary to distinguish between them when referring to "Section 32 of Article 16." This distinction can readily be made by referring to the 1940 amendment as "Original Section 32 of Article 16, adopted in 1940," and to the 1942 amendment as "Additional Section 32 of Article 16, adopted in 1942."

It is my opinion that the original Section 32 of Article 16, adopted in 1940, and the statutes adopted thereunder, are in full force, unaffected by the adoption of additional Section 32 in 1942, and that under said original Section 32 and said statutory provisions the parole commission has legal authority to grant paroles or conditional releases and to make such investigations as may be necessary in order to carry out their duties.

SCHEDULE

November 26, 1945.—045-368.

TAX ASSESSOR—WITHDRAWAL OF APPOINTMENT

QUESTION: It appears that "A" was elected and commissioned tax assessor in and for Clay county on January 7, 1941 for the four-year term. He was granted leave of absence July 17, 1942 and his wife, "B" was appointed as acting tax assessor during his active military service. In the general election of 1944, "B" was elected as tax assessor in and for Clay county and was commissioned on January 2, 1945 for the four-year term.

On October 6, 1945, "B" resigned, her husband having returned from service in the armed forces, and "A" was appointed as her successor, for the term ending the first Tuesday after the first Monday in January, 1947. On November 16th the governor's office was requested to withdraw the resignation of "B" and the appointment and commission of "A." Has the governor authority to make such withdrawal and what procedure should be followed in so doing?

To Honorable Millard F. Caldwell, Governor:

It is my opinion that when "B" resigned on October 6, 1945, and her resignation was accepted by you, the office became vacant; that when you appointed "A" as her successor for the term ending the first Tuesday after the first Monday in January, 1947, this was correct by virtue of Article XVIII, Section 6 of our Constitution, which says:

"The term of office for all appointees to fill vacancies in any of the elective offices under this constitution shall extend only to the first Tuesday after the first Monday in January next after the election and qualification of a successor."

and by such appointment and commission of "A" the office of tax assessor was thereupon duly filled.

I see no way by which you may now withdraw the appointment and commission to "A" and allow "B" to withdraw her resignation.

CHAPTER XL

MISCELLANEOUS OPINIONS

June 27, 1946.—046-287.

BROKER—SALESMAN—TAX LIABILITY

QUESTIONS: (1) Where a business house, located in one county, maintains solicitors or salesmen in other counties for the purpose of taking orders for merchandise at retail, which orders are forwarded to the said business house to be accepted, filled and delivered to the vendee, is such business house subject to an occupational license tax in each county wherein such orders are taken and the merchandise delivered to the said vendee?

(2) Where a business house, located in one county, maintains solicitors or salesmen in other counties for the purpose of taking orders for merchandise at retail, which orders are forwarded to the said business house to be accepted, filled and delivered to the vendee, are such solicitors or salesmen subject to an occupational license tax in each county wherein they take orders and the merchandise is delivered to the said vendee?

To Honorable J. M. Lee, State Comptroller:

It appears that the Jewel Tea Company, Inc., is a foreign corporation, having its principal place of business in Barrington, Illinois, and a place of business in Jacksonville, Florida; that the said company sends its solicitors or salesmen throughout the state to solicit orders for the sale of merchandise at retail. When orders are obtained they are forwarded to the company's place of business in Jacksonville, where they are filled and the merchandise sent out, by some means of transportation, for delivery to the purchaser. This delivery may be made by the same solicitor or salesman who procured the order or by some third person.

The taking of the order, the sending of it to the office in Jacksonville, the filling of it and the transportation of the merchandise to the home of the purchaser and the making of the delivery in accordance with the order are all parts of one transaction and not a series of separate transactions (*Duffin v. Tucker*, 113 Fla. 621, 153 So. 298).

Section 205.59, Florida Statutes, 1941, provides a license tax against "every person engaged in the business of trading, buying, bartering, serving, or selling tangible personal property as owner, agent, broker, or otherwise." Under section 205.01, the license tax is to be levied and collected in the "county where the place of business may be located, or where the profession or occupation may be engaged in." Under this rule, it appears that the place of business of the tea company, or the place of the contract or transaction, is Duval county, Florida (22 Words and Phrases 565 and 574), and that the tea company's liability for tax is in Duval county and not the county where the order was taken and where the vendee resides. This seems to answer the first question.

Under said section 205.59, the license taxes may be levied against the "owner, agent, broker, or otherwise." Under decisions from other states, traveling salesmen, drummers and selling agents have been held to be "an agent" of the firm or business house represented by them. (63 C. J. 808, section 6, and authorities cited in Words and Phrases under the words "Traveling Salesmen," "Drummer," "Commercial Traveler," etc.). However, the word "broker" does not usually include traveling salesmen and drummers (*Hamberger v. Marcus*, 157 Pa. 133, 27 Atl. 681). The word "otherwise," as used in section 205.59, Florida Statutes, 1941, appears to have been used in a limited sense and should receive an ejusdem generis construction (30 Words and Phrases 495; *Pool v. Thomas*, 93 Fla. 285, 111 So. 625, text 626). From the above and foregoing authorities, it seems that the phrase "owner, agent, broker, or otherwise," is broad enough to include salesmen, solicitors and drummers taking orders for tangible personal property for a business establishment, unless there be some obstruction to the operation of the statute under such a construction.

The transaction involved in this case is not affected by the commerce provision of the constitution of the United States. License taxes against drummers, traveling salesmen and canvassers appear to have been upheld in many cases (37 C. J. 223, section 77, note 53).

I am, therefore, of the opinion that under section 205.59, Florida Statutes, 1941, drummers, traveling salesmen and canvassers are subject to an occupational tax when not engaged in interstate commerce. Such persons are exercising a profession or business within the above mentioned statute. I am, therefore, of the opinion that the second question should be answered in the affirmative.

In the light of the above authorities, I am of the opinion that the first question stated above should be answered in the negative, and that the second question should be answered in the affirmative.

December 21, 1946.—046-531.

INCOMPETENCY—DRUNKENNESS

QUESTION: Is incompetency by reason of drunkenness a physical condition within the meaning and intent of Sections 394.20 and 744.31, Florida Statutes, 1941, as amended by the laws of 1945?

To Honorable William C. Booker, County Judge, Hillsborough County, Tampa, Florida:

Section 744.31, Florida Statutes, 1941, as amended, says:

"No guardian of the person or of the property, or of both, of a person alleged to be mentally or physically incompetent can be appointed until after such person has been adjudicated to be incompetent in separate proceedings instituted for that purpose in accordance with Sections 394.20 to 394.22, inclusive, of the Florida Statutes, relating to the adjudication of incompetency. After such adjudication, a petition may be filed for the appointment of a guardian of either the person or of the property, or of both, of such person, and the general guardianship laws of this state shall apply to such petition and to all subsequent proceedings thereon."

Section 394.20, Florida Statutes, 1941, as amended says whenever any person within this state is believed to be incompetent by reason of sickness, drunkenness, excessive use of drugs, insanity or other mental or physical condition, so that he is incapable of caring for himself or managing his property, or is likely to dissipate or lose his property, the county judge may upon petition inquire as to the mental or physical condition, or both, of said alleged incompetent.

I think a casual reading of the statutes will answer your question in the affirmative to this extent—"it could be."

Of course, I make no opinion as to the evidence which will convince the county judge of such physical incompetency.

September 26, 1946.—046-408.

INSURANCE AGENT—OCCUPATIONAL LICENSE

QUESTION: Under the provisions of Section 205.45, 1945 Supplement to Florida Statutes, 1941, is a county license required to be paid for insurance agents or solicitors in counties other than where they reside and their offices are located, if they solicit or sell insurance, or perform any other act of an insurance agent or solicitor in such other counties?

To Honorable J. Edwin Larson, Insurance Commissioner:

Section 205.01, Florida Statutes, 1941, provides, in part, that no person shall engage in or manage any business, profession or occupation, for

which an occupational license tax is required, "unless a state license, or a state and county license, or county license, as the case may be, shall have been procured from the tax collector of the county where the place of business may be located or where the profession or occupation may be engaged in * * *"

Section 205.45(1), 1945 Supplement to Florida Statutes, 1941, provides that each person engaged in the insurance business in this state who sells or writes insurance through, or employs agents or solicitors, shall on the first day of October of each year, furnish the state treasurer with a list of the names and addresses of all such agents and solicitors authorized to solicit, negotiate, effect or write contracts of insurance, surety or indemnity in this State, and for each such agent or solicitor shall pay to the state treasurer a state license tax of six dollars per annum, and for each agent or solicitor shall pay to the state treasurer a county license tax of three dollars per annum. Section 205.45(2) provides the method for distribution of such county license taxes to the appropriate counties.

For comparison purposes, reference is made to Sections 205.52 and 205.02, Florida Statutes, 1941, providing for state and county occupational license taxes for those engaged in the practice of any profession. These sections are no more explicit than above Section 205.45, yet it has never been urged that a lawyer, doctor, dentist or other professional man contemplated by Section 205.52 is required to pay a county license in any county other than the county wherein he holds himself out as practicing his profession. The rule, of course, would be different in any instance where such a professional man maintained offices in more than one county. While a licensed insurance agent or solicitor is not engaged in the practice of a profession as contemplated by said Section 205.52, for the purposes of occupational license taxes his situation would reasonably appear to be similar to that of one engaged in the practice of such a profession.

In view of the foregoing, in my opinion the above question properly is answered as follows:

A county occupational license is required to be paid for an insurance agent or solicitor, under the provisions of said Section 205.45, only in the county where such agent or solicitor resides and has his place of business, even though he also engages in the business activities of such an agent or solicitor in other counties; provided, that if such a person maintains an office or place of business in more than one county, a county license is required for him in each county where such office or place of business is maintained.

August 6, 1945.—045-222.

EMPLOYMENT OF GUARDS AND SERVANTS

QUESTIONS: (1) Does the law require that a sheriff have any particular number of prisoners in the county jail in order to entitle him to employ a guard and a servant for such jail?

(2) What requirements of law must be met to entitle a sheriff to collect from the county the statutory fees for a guard and a servant employed at the county jail?

(3) The sheriff deputizes a man and employs and pays him as a guard. May such guard also perform the duties of jailer without additional compensation therefor?

To Honorable J. L. Baggett, Sheriff of Dixie County, Cross City, Florida:

(1) and (2). Chapter 22587, Laws of Florida, Acts of 1945, provides the following fees to be charged by sheriffs for guards and servants, to wit:

"Guards, not more per day than \$5.00"

"Servants, not more per day than \$3.00"

Under the rule laid down by the Supreme Court of Florida in *Brown vs. St. Lucie County*, 153 So. 906, the requirements that must be met to entitle a sheriff to bill the county for guard hire are as follows: Such guard must be employed for the proper protection and management of the county jail, the employment must be in the exercise of the sheriff's fair and honest judgment, based upon a real necessity, and the amount billed against the county must have actually been paid by the sheriff to such guard and must not be in excess of the amount allowable under Chapter 22587. The same requirements are applicable to a servant employed by the sheriff for the county jail. The number of prisoners confined in the jail does not affect the sheriff's right to employ a guard and a servant except in so far as the number of prisoners may be a factor entering into the sheriff's determination of whether the employment of such guard and servant is essential.

(3) When a guard is deputized, employed and paid by a sheriff in accordance with the requirements outlined above, it is my opinion that such guard may perform the duties of jailer without additional compensation.

May 3, 1945.—045-103.

GOVERNOR—AUTHORITY TO TRANSFER COUNTY
PROSECUTING ATTORNEY

QUESTION: Has the governor the authority to transfer a county prosecuting attorney from one county to another?

To Honorable Millard F. Caldwell, Governor:

In a criminal case pending in DeSoto county court, the judge is disqualified, and I understand that you are transferring another judge to DeSoto county to try the cause. You desire to know if you can also transfer a county prosecuting attorney to DeSoto county.

Section 34.15, Florida Statutes, 1941, says:

"When any prosecuting attorney of any county court is sick and unable to perform the duties of such prosecuting attorney, or is disqualified to perform such duties by reason of being formerly employed in the defense of any person charged with a violation of the law within the jurisdiction of such court, or is absent from the county wherein such county court is or may be established, the judge of the county court shall appoint a competent attorney, admitted to practice in such court, to be acting prosecuting attorney of such court during the absence or the disability of the prosecuting attorney. Such acting prosecuting attorney shall have and exercise all the duties and powers of the prosecuting attorney during such appointment * * *."

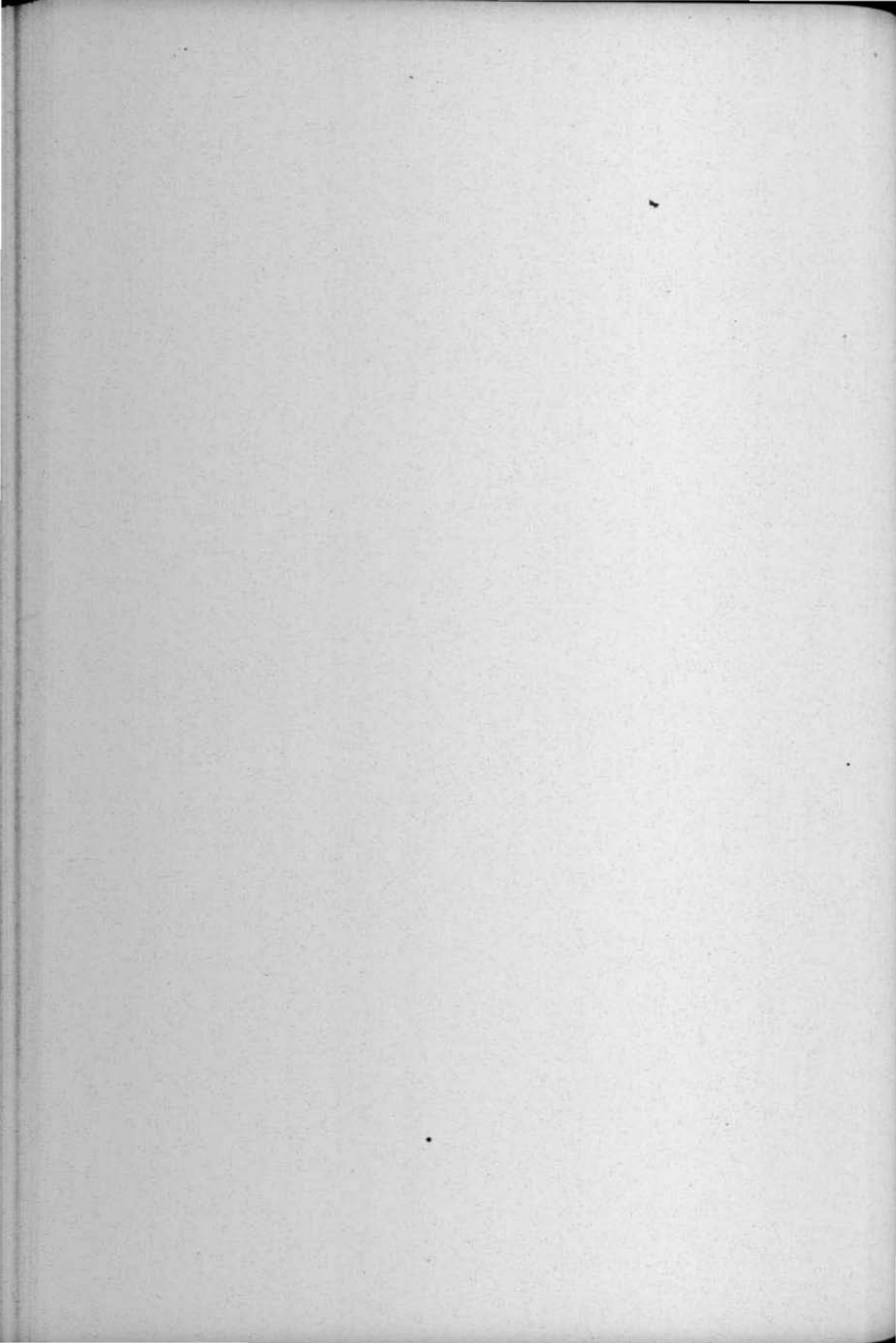
The transfer of the said judge as above set forth is governed by Section 38.09, Florida Statutes, 1941.

That judge shall have the same powers as the disqualified judge. He would, therefore, have the same power to appoint a prosecuting attorney, if one should be disqualified as set forth in the above Section 34.15.

I believe that upon a showing that the judge so appointed is unable, or it is impractical for him, to get anyone to accept such an appointment, then you may assign a prosecuting attorney of another county to act.

See Advisory Opinion to the Governor, 10 So. 2d. 926.

APPENDIX



REPORTS OF STATE ATTORNEYS FOR YEARS 1945-1946, INCLUSIVE, UNDER SECTION 16.09, FLORIDA STATUTES, 1941

FIRST JUDICIAL CIRCUIT

Escambia County
Okaloosa County

Santa Rosa County
Walton County

ESCAMBIA:

(No report submitted in time for publication.)

OKALOOSA:	(A)	(B)	(C)	(D)	(E)
Adultery	2	4	—	2	—
Aggravated assault	9	7	—	7	1
Arson	8	2	—	8	1
Assault with intent to commit a felony	10	3	—	8	1
Bigamy	16	4	1	14	1
Breaking and entering	13	4	2	11	—
Crime against nature	2	—	—	2	—
Election frauds	1	—	—	—	1
Embezzlement	—	2	—	—	—
Extortion	—	1	—	—	—
False pretense	2	2	—	2	—
Forgery	4	—	—	4	—
Gambling houses	2	—	1	—	1
Homicide:					
Murder, first degree	1	—	—	—	—
Manslaughter	1	1	—	2	—
Larceny	21	12	3	16	1
Liquor	8	1	1	7	—
Nonsupport or desertion	11	6	—	9	2
Rape	1	1	—	—	1
Receiving stolen property	4	1	1	3	—
Robbery	3	—	—	2	1
Worthless checks and drafts	2	1	1	1	—
Miscellaneous crimes not otherwise listed	33	8	3	25	2

OTHER CASES HANDLED

	Number
Appeals from lower court to circuit court	2
Criminal hearings attended	13
Habeas corpus hearings attended	2

Respectfully submitted,

J. EDWIN HOLSBERRY,
State Attorney.

SANTA ROSA::

(No report submitted in time for publication.)

- (A) Indictments and Informations.
- (B) No True Bills and No Informations.
- (C) Nolle Prosequi.
- (D) Convictions.
- (E) Acquittals.

WALTON:	(A)	(B)	(C)	(D)	(E)
Adultery	—	2	—	—	—
Aggravated assault	15	5	—	13	2
Arson	—	1	—	—	—
Assault with intent to commit a felony	14	2	1	9	1
Breaking and entering	8	—	2	6	—
Carnal intercourse with unmarried female	1	1	—	1	—
Election frauds	1	—	—	—	—
Embezzlement	1	—	—	1	—
False pretense	2	—	—	2	—
Forgery	2	—	—	2	—
Homicide:					
Manslaughter	2	1	—	1	1
Incest	—	1	—	—	—
Larceny	7	2	—	7	—
Liquor	3	1	—	3	—
Nonsupport or desertion	1	4	—	1	—
Railroad commission violations	12	—	—	2	—
Receiving stolen property	1	2	1	—	—
Worthless checks and drafts	2	1	1	1	—
Miscellaneous crimes not otherwise listed	48	7	—	44	1

OTHER CASES HANDLED

	Number
Appeals from lower court to circuit court	1
Bond estreature proceedings	18
Bond validation proceedings	1
Criminal hearings attended	9
Habeas corpus hearings attended	2

Respectfully submitted,

J. EDWIN HOLSBERRY,
State Attorney.

SECOND JUDICIAL CIRCUIT

Franklin County	Leon County
Gadsden County	Liberty County
Jefferson County	Wakulla County

FRANKLIN:

(No report submitted in time for publication.)

GADSDEN:

(No report submitted in time for publication.)

JEFFERSON:

(No report submitted in time for publication.)

LEON:

(No report submitted in time for publication.)

- (A) Indictments and Informations.
 (B) No True Bills and No Informations.
 (C) Nolle Prosequi.
 (D) Convictions.
 (E) Acquittals.

LIBERTY:

(No report submitted in time for publication.)

WAKULLA:

(No report submitted in time for publication.)

THIRD JUDICIAL CIRCUIT

Columbia County
Dixie County
Hamilton County
Lafayette County

Madison County
Suwannee County
Taylor County

COLUMBIA:

	(A)	(B)	(C)	(D)	(E)
Aggravated assault	3	—	1	5	—
Assault with intent to commit a felony	13	4	4	2	2
Attempt to commit a felony	4	—	2	1	—
Breaking and entering	29	1	—	20	1
Embezzlement	2	1	2	—	—
False pretenses	4	—	3	—	—
Forgery	1	—	—	—	—
Hit and run driver	—	1	—	—	—

Homicide:

Murder, first degree	—	1	—	—	—
Manslaughter	—	1	—	—	—
Larceny	25	5	6	18	1
Malpractice in office	1	—	—	1	—
Negligently injuring another not resulting in death	—	1	—	—	—
Nonsupport or desertion	22	3	5	9	—
Perjury	1	—	3	1	1
Rape	2	1	1	1	—
Receiving stolen property	4	3	1	3	—
Robbery	1	—	—	1	—
Unlawfully disposing of personal property sub- ject to mortgage	3	—	3	—	—
Unlawfully shooting into a building	1	—	—	—	1
Worthless checks and drafts	—	1	—	—	—

OTHER CASES HANDLED

Criminal hearings attended

Number
109

Respectfully submitted,

A. K. BLACK,
State Attorney.

DIXIE:

	(A)	(B)	(C)	(D)	(E)
Aggravated assault	—	—	—	1	—
Assault with intent to commit a felony	5	1	—	3	—
Breaking and entering	6	2	1	4	—
Enticing a female to leave home for immoral purposes	—	1 *	—	—	—
False pretense	—	1	—	—	—
Forgery	2	—	—	—	—

- (A) Indictments and Informations.
(B) No True Bills and No Informations.
(C) Nolle Prosequi.
(D) Convictions.
(E) Acquittals.

Homicide:

Murder, first degree	2	1	1	—	—
Manslaughter	1	1	2	—	—
Improper exhibition of dangerous weapon	1	—	—	—	—
Larceny	4	3	1	1	—
Lottery	3	1	—	3	—
Nonsupport or desertion	8	3	—	3	—
Resisting officer with violence to his person	1	—	—	—	—
Robbery	2	—	1	—	1
Unlawfully fondling a child	1	—	—	—	1
Unlawfully shooting into a building	1	—	—	—	—
Worthless checks and drafts	2	1	—	—	1

OTHER CASES HANDLED

	Number
Appeals from lower court to circuit court	1
Bond estreature proceedings	1
Criminal hearings attended	56
Habeas corpus hearings attended	9

Respectfully submitted,

A. K. BLACK,
State Attorney.

HAMILTON:	(A)	(B)	(C)	(D)	(E)
Aggravated assault	5	—	1	4	—
An affray assault	1	—	—	1	—
Assault with intent to commit a felony	10	7	1	1	4
Breaking and entering	6	2	—	5	—
Crime against nature	1	—	—	1	—
Embezzlement	2	1	1	—	—
Entering without breaking	2	—	—	2	—
False pretense	2	—	—	—	—
Forgery	1	—	—	—	—
Homicide:					
Murder, first degree	4	2	1	1	—
Murder, second degree	—	—	—	1	—
Manslaughter	2	—	1	1	1
Larceny	12	2	3	1	—
Maintaining and operating a nuisance	1	—	—	—	—
Narcotics	—	1	—	—	—
Negligently injuring another not resulting in death	1	—	—	1	—
Nonsupport or desertion	11	—	—	7	—
Perjury	1	—	—	1	—
Possession of obscene pictures	1	—	—	—	—
Rape	—	1	—	—	—
Receiving stolen property	8	—	1	5	—
Resisting arrest by officer	2	—	2	—	—
Robbery	2	—	1	1	—
Unlawfully exhibiting a dangerous weapon	1	—	—	—	—
Unlawfully throwing explosive in waters in Hamilton county, Florida, for purpose of killing fish	3	—	—	3	—
Worthless checks and drafts	2	—	1	—	—

- (A) Indictments and Informations.
 (B) No True Bills and No Informations.
 (C) Nolle Prosequi.
 (D) Convictions.
 (E) Acquittals.

OTHER CASES HANDLED

	Number
Bond estreature proceedings attended	6
Criminal hearings attended	75
Habeas corpus hearings attended	2
Other cases not enumerated	1

Respectfully submitted,

A. K. BLACK,
State Attorney.

LAFAYETTE:

	(A)	(B)	(C)	(D)	(E)
Aggravated assault	—	1	—	—	—
Assault with intent to commit a felony	1	—	—	—	—
Carnal intercourse with unmarried female	—	1	—	—	—
Hit and run driver	1	—	—	—	—
Homicide:					
Murder, second degree	1	—	—	—	—
Manslaughter	1	—	—	1	—
Larceny	5	—	—	2	—
Negligently injuring another not resulting in death	2	—	—	1	—
Unlawful acts committed under color of office	1	—	—	—	—

OTHER CASES HANDLED

	Number
Criminal hearings attended	28

Respectfully submitted,

A. K. BLACK,
State Attorney.

MADISON:

	(A)	(B)	(C)	(D)	(E)
An affray	1	—	—	—	—
Aggravated assault	2	—	—	2	—
Arson	—	1	—	—	—
Assault with intent to commit a felony	5	4	3	1	—
Attempt to commit a felony	1	—	—	—	—
Breaking and entering	6	—	1	6	—
False pretense	1	—	—	—	—
Forgery	3	—	—	1	—
Gambling houses	1	—	—	1	—
Homicide:					
Murder, first degree	2	—	—	1	—
Manslaughter	—	—	—	1	—
Larceny	10	3	1	9	—
Lottery	—	2	—	—	—
Nonsupport or desertion	22	5	10	6	—
Perjury	—	—	1	—	—
Rape	1	2	1	—	—
Robbery	1	—	—	1	—
Unlawfully disposing of personal property subject to lien	3	—	2	1	—
Unlawfully fondling a child	1	—	—	—	—

- (A) Indictments and Informations.
 (B) No True Bills and No Informations.
 (C) Nolle Prosequi.
 (D) Convictions.
 (E) Acquittals.

OTHER CASES HANDLED

Criminal hearings attended	Number 63
Habeas corpus hearings attended	1

Respectfully submitted,

A. K. BLACK,
State Attorney.

SUWANNEE:	(A)	(B)	(C)	(D)	(E)
Adultery	1	—	1	—	—
Aggravated assault	1	—	1	5	—
Assault with intent to commit a felony	16	12	2	6	3
Attempt to commit a felony	3	1	—	1	1
Breaking and entering	17	1	1	7	—
Crime against nature	1	—	—	1	—
Embezzlement	5	1	1	—	—
False imprisonment	—	1	—	—	—
Forgery	9	1	—	7	—
Fraudulently marking animals of another	3	—	2	—	1
Homicide:					
Murder, first degree	3	1	—	—	1
Manslaughter	—	—	—	1	—
Incest	13	—	—	1	—
Larceny	12	2	3	10	2
Negligently inflicting personal injury to another not resulting in death	1	3	—	1	—
Nonsupport or desertion	2	1	—	—	—
Rape	1	1	—	1	—
Receiving stolen property	8	1	1	7	—
Resisting officer with violence to his person	—	2	2	—	—
Robbery	2	—	1	—	1
Unlawfully fondling a child	1	—	—	—	—
Unlawfully throwing explosive in river to kill fish	—	1	—	—	—
Unmarking another's heifer	—	1	—	—	—

OTHER CASES HANDLED

Criminal hearings attended	Number 84
Habeas corpus hearings attended	9

Respectfully submitted,

A. K. BLACK,
State Attorney.

TAYLOR:	(A)	(B)	(C)	(D)	(E)
Adultery	1	—	1	—	—
Aggravated assault	—	—	—	3	—
Arson	—	3	—	—	—
Assault and battery	—	—	—	1	—
Assault with intent to commit a felony	6	2	—	—	—
Breaking and entering	9	4	3	6	—
Cruelty to animals	1	—	—	—	—
Embezzlement	1	—	—	1	1
Homicide:					
Murder, first degree	1	—	—	—	—
Manslaughter	1	—	—	1	—

- (A) Indictments and Informations.
 (B) No True Bills and No Informations.
 (C) Nolle Prosequi.
 (D) Convictions.
 (E) Acquittals.

Larceny	13	1	1	9	2
Negligently injuring another not resulting in death	1	—	—	—	—
Nonsupport or desertion	12	2	3	11	—
Perjury	2	—	2	1	—
Receiving stolen property	6	6	—	4	1
Unlawfully burning woods	—	1	—	—	—

OTHER CASES HANDLED

Bond estreature proceedings attended	Number 2
Criminal hearings attended	66

Respectfully submitted,

A. K. BLACK,
State Attorney.

FOURTH JUDICIAL CIRCUIT

Clay County

Nassau County

Duval County

CLAY:	(A)	(B)	(C)	(D)	(E)
Assault with intent to commit a felony	8	2	—	6	2
Breaking and entering	9	—	1	7	—
Crime against nature	1	—	—	1	—
Forgery	2	—	—	2	—
Hit and run	—	2	—	—	—
Homicide:					
Murder, first degree	2	—	—	1	—
Manslaughter	4	—	—	2	1
Indecent assault upon child	1	—	—	1	—
Larceny	11	1	—	8	2
Nonsupport or desertion	—	2	—	—	—
Possession of mash, moonshine	—	2	—	—	—
Rape	1	—	—	1	—
Robbery	2	—	—	1	—
Trespass	—	2	—	—	—

OTHER CASES HANDLED

Bond estreature proceedings	Number 1
Criminal hearings attended	53
Habeas corpus hearings attended	5
Other cases not enumerated	19

Respectfully submitted,

WILLIAM A. HALLOWES, III,
State Attorney.

DUVAL:	(A)	(B)	(C)	(D)	(E)
Homicide:					
Murder, first degree	32	9	2	19	5
Rape	5	2	—	2	3

- (A) Indictments and Informations.
 (B) No True Bills and No Informations.
 (C) Nolle Prosequi.
 (D) Convictions.
 (E) Acquittals.

OTHER CASES HANDLED

	Number
Appeals from lower court to circuit court	2
Bond estreature proceedings	63
Bond validation proceedings	2
Criminal hearings attended	211
Habeas corpus hearings attended	29
Other cases not enumerated	108

Respectfully submitted,
 WILLIAM A. HALLOWES, III,
 State Attorney.

NASSAU:	(A)	(B)	(C)	(D)	(E)
Assault with intent to commit a felony	4	1	—	4	—
Breaking and entering	9	2	2	6	1
Destruction of personal property	1	—	1	—	—
Embezzlement	1	—	—	1	—
Forgery	2	—	1	1	—
Hit and run	2	—	—	1	—
Homicide:					
Murder, second degree	1	—	—	—	1
Manslaughter	1	—	—	1	—
Incest	1	—	1	—	—
Larceny	7	—	2	4	1
Mayhem	1	—	—	1	—
Mutilating county building	2	—	1	—	1
Railroad commission violations	7	—	6	—	—
Receiving stolen property	1	—	1	—	—
Resisting arrest	1	—	—	1	—

OTHER CASES HANDLED

	Number
Criminal hearings attended	67
Habeas corpus hearings attended	7
Other cases not enumerated	36

Respectfully submitted,
 WILLIAM A. HALLOWES, III,
 State Attorney.

FIFTH JUDICIAL CIRCUIT

Citrus County Lake County
 Hernando County Marion County
 Sumter County

CITRUS:	(A)	(B)	(C)	(D)	(E)
Affray	1	—	—	1	—
Aiding prisoner to escape	1	—	1	1	—
Assault with intent to commit a felony	3	—	3	1	1
Bigamy	1	—	1	1	—
Breaking and entering	8	—	3	6	2

(A) Indictments and Informations.
 (B) No True Bills and No Informations.
 (C) Nolle Prosequi.
 (D) Convictions.
 (E) Acquittals.

Embezzlement	1	—	—	—	—
Escape	1	—	2	1	—
Forgery	1	—	1	1	2
Hit and run driver	—	—	1	—	—
Homicide:					
Murder, first degree	1	—	2	—	1
Murder, second degree	—	—	—	—	1
Manslaughter	1	—	—	—	2
Larceny	2	—	—	—	2
Nonsupport or desertion	3	—	4	—	—
Receiving stolen property	1	—	—	1	—
Resisting arrest	2	—	2	—	—
Shooting into dwelling	1	—	—	1	—

Respectfully submitted,

J. W. HUNTER,
State Attorney.

HERNANDO:	(A)	(B)	(C)	(D)	(E)
Arson	1	—	—	1	—
Assault with intent to commit a felony	6	1	—	5	—
Attempt to commit a felony	1	—	—	1	—
Breaking and entering	4	—	—	4	—
Embezzlement	1	—	—	—	—
Hit and run driver	1	—	—	—	—
Homicide:					
Manslaughter	1	1	—	—	2
Kidnapping	—	—	1	—	—
Larceny	3	1	—	3	1
Nonsupport or desertion	2	—	—	4	—
Wantonly killing animal of another	1	—	—	—	—
Wantonly shooting in house of another	—	—	1	—	—

Respectfully submitted,

J. W. HUNTER,
State Attorney.

LAKE:	(A)	(B)	(C)	(D)	(E)
Adultery	1	—	—	—	—
Aiding prisoners to escape	2	—	—	—	2
Assault with intent to commit a felony	22	—	2	13	—
Attempt to break and enter	1	—	—	1	—
Breaking and entering	25	—	—	21	—
Crime against nature	2	—	—	—	—
Embezzlement	1	—	1	—	—
False pretense	4	—	—	—	—
Forgery	10	—	—	10	—
Gambling houses	1	—	—	1	—
Hit and run driver	2	—	—	1	—
Homicide:					
Murder, first degree	4	1	—	2	1
Manslaughter	5	—	—	4	—
Larceny	25	—	3	12	1
Lewd and lascivious cohabitation	2	—	—	—	—
Lottery	1	—	—	—	1

- (A) Indictments and Informations.
 (B) No True Bills and No Informations.
 (C) Nolle Prosequi.
 (D) Convictions.
 (E) Acquittals.

Malicious destruction of property	1	—	—	1	—
Narcotics	1	—	—	1	—
Negro living with white woman	1	—	—	1	—
Nonsupport or desertion	10	—	—	4	—
Rape—intent	1	—	—	—	—
Receiving stolen property	2	1	—	1	—
Robbery	2	—	—	—	1

OTHER CASES HANDLED

	Number
Bond estreature proceedings	12
Bond validation proceedings	1
Other cases not enumerated	1

Respectfully submitted,

J. W. HUNTER,
State Attorney.

MARION:	(A)	(B)	(C)	(D)	(E)
Adultery	1	—	1	1	—
Aggravated assault	—	—	—	5	—
Arson	1	2	—	—	1
Assault with intent to commit a felony	18	8	2	8	3
Attempt to commit a felony	1	—	—	1	—
Breaking and entering	31	1	4	19	4
Carnal intercourse with unmarried female	2	1	2	1	—
Common cheat	2	—	—	—	—
Cutting, carrying away timber	1	—	1	—	—
Driving drunk, property damage	1	—	—	1	—
Embezzlement	4	—	2	1	1
Escape	6	—	—	6	—
Forgery	31	1	2	27	—
Gambling houses	2	—	1	—	—
Hit and run driver	—	—	1	—	—
Homicide:					
Murder, first degree	2	—	1	—	—
Manslaughter	1	2	—	2	—
Larceny	23	3	3	14	3
Lottery	13	3	4	8	—
Malpractice in office	1	—	—	1	—
Nonsupport or desertion	18	3	2	2	1
Rape	—	1	—	—	—
Robbery	4	3	2	2	1
Shooting into dwelling	1	—	—	—	—
Worthless checks and drafts	2	—	2	—	—
Miscellaneous crimes not otherwise listed	10	1	5	3	1

OTHER CASES HANDLED

	Number
Appeals from lower court to circuit court	2
Bond estreature proceedings	6
Criminal hearings attended	90
Habeas corpus hearings attended	5

Respectfully submitted,

J. W. HUNTER,
State Attorney.

- (A) Indictments and Informations.
 (B) No True Bills and No Informations.
 (C) Nolle Prosequi.
 (D) Convictions.
 (E) Acquittals.

SUMTER:	(A)	(B)	(C)	(D)	(E)
Aggravated assault	—	—	—	3	—
Assault with intent to commit a felony	5	1	—	3	—
Breaking and entering	4	—	—	4	—
Crime against nature	1	—	—	—	—
Embezzlement	1	—	—	—	—
False pretense	1	—	—	1	—
Homicide:					
Murder, first degree	1	1	—	—	—
Murder, second degree	2	—	1	1	—
Larceny	5	3	—	1	—
Narcotics	1	—	—	1	—
Rape	—	1	—	—	—
Miscellaneous crimes not otherwise listed	3	—	—	—	—

OTHER CASES HANDLED

Bond validation proceedings	Number 1
Respectfully submitted,	
J. W. HUNTER,	
State Attorney.	

SIXTH JUDICIAL CIRCUIT

Pasco County

Pinellas County

PASCO:	(A)	(B)	(C)	(D)	(E)
Assault with intent to commit a felony	1	—	—	—	—
Breaking and entering	1	—	—	1	—
Homicide:					
Murder, first degree	3	1	—	1	1
Murder, second degree	—	—	—	1	—
Manslaughter	2	—	—	—	—
Larceny	1	—	—	2	—
Mistreating prisoner	—	1	—	—	—
Nonsupport or desertion	1	—	—	—	—

OTHER CASES HANDLED

Bond validation proceedings	Number 1
Preliminary hearings attended	10
Respectfully submitted,	
CHESTER B. McMULLEN,	
State Attorney.	

PINELLAS:	(A)	(B)	(C)	(D)	(E)
Accessory before the fact	—	1	—	—	—
Adultery	1	1	—	—	—
Aggravated assault	1	—	—	1	—
Arson	1	—	—	—	1
Assault and battery	1	—	—	—	—
Assault with intent to commit a felony	17	4	1	10	—
Attempt, crime against nature	1	—	—	—	—
Attempt to commit a felony	2	1	1	1	—
Bastardy	—	1	1	—	—
Bigamy	1	1	—	2	—

- (A) Indictments and Informations.
 (B) No True Bills and No Informations.
 (C) Nolle Prosequi.
 (D) Convictions.
 (E) Acquittals.

Breaking and entering	46	7	5	43	—
Bribery	1	—	—	—	1
Carnal intercourse	1	1	—	1	1
Crime against nature	2	1	—	2	—
Embezzlement	10	3	1	6	1
Entering a grove	1	—	—	1	—
False pretense	2	1	1	1	—
Forgery	40	3	—	33	—
Homicide:					
Murder, first degree	7	—	—	1	—
Murder, second degree	—	—	—	4	—
Manslaughter	4	—	1	7	1
Incest	2	—	—	—	—
Kidnapping	1	—	—	—	—
Larceny	44	5	1	37	3
Lewd and lascivious acts	1	—	—	—	—
Lottery	5	—	1	1	—
Making false statement to obtain money	1	—	—	1	—
Narcotics	3	1	—	3	—
Nonsupport or desertion	23	10	4	19	—
Prostitution	—	1	—	—	—
Rape	2	—	1	—	1
Receiving stolen property	6	5	2	3	—
Resisting an officer	5	—	—	2	—
Robbery	15	1	1	14	—
Shooting into dwelling	1	—	—	—	1
Unlawfully practicing medicine	2	—	—	2	—
Worthless checks and drafts	5	—	—	5	—

OTHER CASES HANDLED

	Number
Bond estreature proceedings	11
Bond validation proceedings	15
Criminal hearings attended	112
Habeas corpus hearings attended	6
Restorations	12

Respectfully submitted,

CHESTER B. McMULLEN,
State Attorney.

SEVENTH JUDICIAL CIRCUIT

Flagler County
Putnam County

St. Johns County
Volusia County

FLAGLER:	(A)	(B)	(C)	(D)	(E)
Aggravated assault	3	—	—	3	—
Arson	2	—	2	—	—
Assault with intent to commit a felony	1	—	—	1	—
Breaking and entering	3	—	1	2	—
Entering without breaking	1	—	—	—	—
Hit and run driving	1	—	—	1	—

- (A) Indictments and Informations.
 (B) No True Bills and No Informations.
 (C) Nolle Prosequi.
 (D) Convictions.
 (E) Acquittals.

Homicide:				
Murder, first degree	1	—	—	1 —
Manslaughter	3	2	—	3 —
Receiving stolen property	1	—	—	1 —
Using automobile of another without authority	1	—	—	1 —

OTHER CASES HANDLED

	Number
Criminal hearings attended	12
Habeas corpus hearings attended	2
Other cases not enumerated	2

Respectfully submitted,

MURRAY SAMS,
State Attorney.

PUTNAM:	(A)	(B)	(C)	(D)	(E)
Aggravated assault	1	—	—	—	—
Assault with intent to commit a felony	6	4	1	1	—
Breaking and entering	10	9	—	9	—
Burning to defraud—insurance	1	1	1	1	—
Crime against nature	1	1	—	—	—
Entering without breaking	1	—	1	—	—
False pretense	1	1	—	—	—
Forgery	3	—	—	3	—
Gambling houses	10	—	—	2	—
Hit and run	1	—	—	—	—

Homicide:					
Murder, second degree	2	2	—	2	—
Manslaughter	5	2	—	3	—
Larceny	9	4	2	6	2
Lottery	10	—	—	—	—
Nonsupport or desertion	4	2	1	1	—
Rape	1	—	—	1	—
Robbery	2	2	1	2	—
Threatening injury to another	1	—	—	1	—
Unlawful practice of medicine	1	—	—	—	—

OTHER CASES HANDLED

	Number
Criminal hearings attended	2
Other cases not enumerated	2

Respectfully submitted,

MURRAY SAMS,
State Attorney.

ST. JOHNS:	(A)	(B)	(C)	(D)	(E)
Aggravated assault	3	—	—	2	—
Assault with intent to commit a felony	4	—	1	1	—
Attempt to commit a felony	1	—	—	—	—
Breaking and entering	36	—	2	31	—
Carnal intercourse with unmarried female	2	—	1	1	—
Embezzlement	2	—	—	2	—
Forgery	12	—	1	11	—
Hit and run	4	—	2	—	—

- (A) Indictments and Informations.
 (B) No True Bills and No Informations.
 (C) Nolle Prosequi.
 (D) Convictions.
 (E) Acquittals.

Homicide:

Murder, first degree	—	1	—	—	—
Murder, second degree	1	—	—	1	—
Manslaughter	2	—	—	2	—
Impersonating an officer	1	—	—	1	—
Larceny	31	1	3	19	2
Lewd assault upon child	2	—	—	2	—
Miscegenation	—	2	—	—	—
Nonsupport or desertion	3	1	—	3	—
Rape	1	—	—	1	—
Resisting officer	1	—	—	1	—
Robbery	5	—	1	2	—

OTHER CASES HANDLED

	Number
Appeals from lower court to circuit court	2
Criminal hearings attended	12
Habeas corpus hearings attended	3
Other cases not enumerated	6

Respectfully submitted,

MURRAY SAMS,
State Attorney.

VOLUSIA:

	(A)	(B)	(C)	(D)	(E)
Accessory to murder	—	1	—	—	—
Aggravated assault	4	1	—	4	—
Arson	—	3	—	—	—
Assault with intent to commit a felony	5	3	1	2	—
Attempt to commit a felony	3	1	—	3	—
Bastardy	2	1	—	2	—
Bigamy	5	—	1	3	—
Breaking and entering	34	—	6	28	—
Crime against nature	3	—	—	3	—
Embezzlement	5	1	—	5	—
Entering without breaking	1	1	—	1	—
Enticing female from home for immoral purposes	1	3	—	1	—
False pretense	2	1	—	2	—
Forgery	13	—	2	11	—
Hit and run	1	1	—	1	—
Homicide:					
Murder, first degree	12	4	—	1	—
Murder, second degree	2	—	—	1	—
Manslaughter	6	3	1	5	—
Impersonating an officer	1	—	—	1	—
Killing animal of another	1	—	—	1	—
Larceny	27	8	4	20	—
Lewd, lascivious and indecent assault	1	2	—	1	—
No rear lights on truck	—	1	—	—	—
Nonsupport or desertion	—	1	—	—	—
Possession of burglarious tools	—	1	—	—	—
Rape	2	1	—	—	—
Receiving stolen property	2	4	—	2	—
Resisting an officer	—	—	1	—	—
Robbery	4	2	—	4	—
Unlawful practice of medicine	1	—	—	1	—
Unlawful removal of timber	3	—	1	1	1
Worthless checks and drafts	1	2	—	1	—

- (A) Indictments and Informations.
 (B) No True Bills and No Informations.
 (C) Nolle Prosequi.
 (D) Convictions.
 (E) Acquittals.

OTHER CASES HANDLED

	Number
Appeals from lower court to circuit court	51
Bond estreature proceedings	1
Bond validation proceedings	5
Criminal hearings attended	194
Habeas corpus hearings attended	100
Other cases not enumerated	80

Respectfully submitted,

MURRAY SAMS,
State Attorney.

EIGHTH JUDICIAL CIRCUIT

Alachua County

Gilchrist County

Baker County

Levy County

Bradford County

Union County

ALACHUA:

	(A)	(B)	(C)	(D)	(E)
Accessory to the fact to breaking and entering ..	1	—	—	1	—
Adultery	2	—	—	1	—
Aggravated assault	15	9	—	15	—
Arson	1	—	—	1	—
Assault with intent to commit a felony	27	7	—	20	—
Attempt to commit a felony	11	1	1	9	—
Bigamy	26	2	2	23	1
Breaking and entering	10	3	—	—	10
Concealing mortgaged property	1	—	—	1	—
Crime against nature	5	—	—	2	3
Embezzlement	5	6	—	2	—
Entering without breaking	1	—	—	1	—
Forgery	20	2	—	17	1
Fourth conviction of felony	4	—	1	3	—
Hit and run	3	3	—	3	—

Homicide:

Murder, first degree	10	—	1	7	2
Murder, second degree	5	1	—	5	—
Murder, third degree	2	1	—	2	—
Manslaughter	2	2	—	—	2
Larceny	45	10	1	39	—
Lottery	13	—	4	8	1
Maliciously killing animal of another	3	—	—	3	—
Mayhem	—	2	—	—	—
Nonsupport or desertion	27	3	2	18	—
Perjury	—	5	—	—	—
Receiving stolen property	6	—	3	3	—
Resisting an officer	1	—	—	1	—
Robbery	8	—	—	8	—
Worthless checks and drafts	2	—	—	2	—

- (A) Indictments and Informations.
 (B) No True Bills and No Informations.
 (C) Nolle Prosequi.
 (D) Convictions.
 (E) Acquittals.

OTHER CASES HANDLED

	Number
Appeals from lower court to circuit court	9
Bond estreature proceedings	4
Bond validation proceedings	4
Criminal hearings attended	52
Habeas corpus hearings attended	25
Other cases not enumerated	14

Respectfully submitted,

T. E. DUNCAN,
State Attorney.

BAKER:	(A)	(B)	(C)	(D)	(E)
Aggravated assault	3	2	1	2	—
Assault with intent to commit a felony	6	1	1	4	—
Breaking and entering	5	4	—	5	—
Forgery	2	—	—	1	—
Hit and run	1	—	—	—	—
Homicide:					
Murder, first degree	—	2	—	—	—
Murder, second degree	1	—	—	1	—
Manslaughter	2	—	2	—	—
Larceny	14	4	—	14	—
Non-support or desertion	8	—	—	6	—
Possession of explosives without license	1	—	—	1	—
Worthless checks and drafts	1	—	1	—	—

OTHER CASES HANDLED

	Number
Bond estreature proceedings	1
Criminal hearings attended	17
Habeas corpus hearings attended	5
Other cases not enumerated	12

Respectfully submitted,

T. E. DUNCAN,
State Attorney.

BRADFORD:	(A)	(B)	(C)	(D)	(E)
Aggravated assault	2	4	—	2	—
Arson	1	1	—	1	—
Assault with intent to commit a felony	8	11	—	4	—
Bigamy	—	1	—	—	—
Breaking and entering	10	5	—	8	—
Carnal intercourse with unmarried female	1	—	—	—	—
Concealing personal property	—	2	—	—	—
Disposing of property under lien	—	1	—	—	—
Driving drunk with injury to property	—	1	—	—	—
False pretense	1	—	—	1	—
Forgery	4	—	—	1	—
Homicide:					
Murder, first degree	2	1	—	1	1
Murder, second degree	3	1	—	2	—
Manslaughter	—	2	—	—	—
Larceny	4	3	—	3	—
Liquor	1	—	—	1	—

- (A) Indictments and Informations.
 (B) No True Bills and No Informations.
 (C) Nolle Prosequi.
 (D) Convictions.
 (E) Acquittals.

Lottery	5	1	—	5	—
Moving or concealing beverages with intent to defraud state of tax	1	—	—	1	—
Nonsupport or desertion	5	5	—	3	—
Rape	—	1	—	—	—
Robbery	1	3	1	—	—
Transportation of property for compensation without certificate of public convenience and necessity	6	—	—	6	—

OTHER CASES HANDLED

Appeals from lower court to circuit court	Number 4
Bond estreature proceedings	5
Criminal hearings attended	26
Habeas corpus hearings attended	8
Other cases not enumerated	14

Respectfully submitted,

T. E. DUNCAN,
State Attorney.

GILCHRIST:

	(A)	(B)	(C)	(D)	(E)
Adultery	2	—	—	2	—
Aggravated assault	3	—	—	3	—
Assault with intent to commit a felony	2	—	—	2	—
Breaking and entering	2	—	—	2	—
Forgery	3	—	—	3	—
Homicide:					
Manslaughter	1	—	—	1	—
Larceny	6	—	—	4	2
Nonsupport or desertion	4	—	—	4	—
Robbery	1	—	—	—	—
Worthless checks and drafts	1	—	—	1	—

OTHER CASES HANDLED

Criminal hearings attended	Number 6
Other cases not enumerated	4

Respectfully submitted,

T. E. DUNCAN,
State Attorney.

LEVY:

	(A)	(B)	(C)	(D)	(E)
Aggravated assault	4	1	1	1	—
Assault with intent to commit a felony	5	3	2	3	1
Bigamy	—	1	—	—	—
Breaking and entering	13	2	—	11	2
Driving while intoxicated and causing damage to person	1	—	1	—	—
Embezzlement	—	1	—	—	—
Escape	1	—	—	1	—
Forgery	3	—	—	3	—
Handling and fondling female under fourteen years of age	1	—	—	1	—
Hit and run	—	1	—	—	—

- (A) Indictments and Informations.
 (B) No True Bills and No Informations.
 (C) Nolle Prosequi.
 (D) Convictions.
 (E) Acquittals.

Homicide:

Murder, first degree	3	1	—	3	—
Murder, second degree	2	2	—	—	2
Larceny	12	9	2	8	—
Nonsupport or desertion	9	—	2	6	—
Perjury	—	1	—	—	—
Receiving stolen property	2	—	—	2	—
Removing personal property under lien	1	—	1	—	—
Robbery	2	—	—	1	1
Worthless checks and drafts	1	—	1	—	—

OTHER CASES HANDLED

	Number
Appeals from lower court to circuit court	2
Bond estreature proceedings	1
Bond validation proceedings	1
Criminal hearings attended	10
Habeas corpus hearings attended	12
Other cases not enumerated	14

Respectfully submitted,

T. E. DUNCAN,
State Attorney.

UNION:

	(A)	(B)	(C)	(D)	(E)
Aggravated assault	4	3	—	4	—
Assault with intent to commit a felony	—	2	—	—	—
Attempt to commit a felony	3	1	1	2	—
Breaking and entering	5	4	1	4	—
Crime against nature	—	2	—	—	—
Escape	11	—	—	11	—
Forgery	3	3	—	3	—

Homicide:

Murder, first degree	1	1	—	—	—
Murder, second degree	—	1	—	—	—
Larceny	5	5	—	5	—
Nonsupport or desertion	4	—	—	4	—
Receiving stolen property	1	—	—	—	1
Robbery	—	1	—	—	—

OTHER CASES HANDLED

	Number
Criminal hearings attended	13
Habeas corpus hearings attended	10
Other cases not enumerated	8

Respectfully submitted,

T. E. DUNCAN,
State Attorney.

NINTH JUDICIAL CIRCUIT

Brevard County	Orange County
Indian River County	Osceola County
Martin County	St. Lucie County
Okeechobee County	Seminole County

- (A) Indictments and Informations.
 (B) No True Bills and No Informations.
 (C) Nolle Prosequi.
 (D) Convictions.
 (E) Acquittals.

BREVARD:	(A)	(B)	(C)	(D)	(E)
Adultery	2	—	2	—	—
Aggravated assault	1	—	—	1	—
Arson	3	—	1	1	1
Assault with intent to commit a felony	10	—	3	6	1
Attempt to commit a felony	15	—	1	12	—
Bigamy	1	—	1	—	—
Breaking and entering	31	—	5	32	2
Destroying property	1	—	—	1	—
Embezzlement	1	—	—	—	—
False pretense	3	—	—	3	—
Forgery	13	—	9	3	—
Homicide:					
Murder, first degree	4	—	—	3	1
Murder, second degree	1	—	—	—	—
Manslaughter	4	—	2	1	—
Keeping house of ill fame	2	—	2	1	—
Larceny	20	—	1	18	—
Leaving scene of accident	3	—	—	2	—
Motor vehicle law violation	1	—	—	1	—
Nonsupport or desertion	3	—	—	—	—
Poisoning food	1	—	1	—	—
Robbery	1	—	—	1	—
Worthless checks and drafts	1	—	—	—	—

OTHER CASES HANDLED

	Number
Appeals from lower court to circuit court	2
Criminal hearings attended	24

Respectfully submitted,

MURRAY W. OVERSTREET,

State Attorney.

INDIAN RIVER:	(A)	(B)	(C)	(D)	(E)
Assault with intent to commit a felony	5	3	1	2	2
Bigamy	1	—	1	—	—
Breaking and entering	5	—	—	3	2
Cutting fence	—	—	—	1	—
Embezzlement	2	—	1	1	—
False pretense	1	—	—	—	1
Forgery	1	—	—	1	—
Homicide:					
Murder, second degree	2	—	—	—	2
Manslaughter	2	—	—	2	—
Injunction against nuisance	1	—	—	—	—
Larceny	12	—	—	11	1
Liquor	1	—	—	—	1
Lottery	5	—	1	3	1
Narcotics	1	—	—	1	—
Rape	1	—	1	—	—
Resisting an officer	2	—	—	2	—

- (A) Indictments and Informations.
 (B) No True Bills and No Informations.
 (C) Nolle Prosequi.
 (D) Convictions.
 (E) Acquittals.

OTHER CASES HANDLED

	Number
Appeals from lower court to circuit court	1
Bond estreature proceedings	2
Criminal hearings attended	40
Habeas corpus hearings attended	10

Respectfully submitted,

MURRAY W. OVERSTREET,
State Attorney.

MARTIN:	(A)	(B)	(C)	(D)	(E)
Assault with intent to commit a felony	5	—	1	3	1
Breaking and entering	7	—	—	6	1
Embezzlement	2	—	—	1	—
Homicide:					
Murder, first degree	1	—	—	1	—
Manslaughter	1	—	—	—	1
Larceny	6	—	—	5	1
Restoration of sanity	1	—	—	—	—

OTHER CASES HANDLED

	Number
Appeals from lower court to circuit court	3
Criminal hearings attended	34
Habeas corpus hearings attended	2
Other cases not enumerated	2

Respectfully submitted,

MURRAY W. OVERSTREET,
State Attorney.

OKEECHOBEE:	(A)	(B)	(C)	(D)	(E)
Assault with intent to commit a felony	2	—	—	1	1
Bribery	1	—	—	1	—
Homicide:					
Murder, first degree	1	—	—	1	—
Larceny	2	—	—	2	—

OTHER CASES HANDLED

	Number
Criminal hearings attended	15
Habeas corpus hearings attended	3
Other cases not enumerated	4

Respectfully submitted,

MURRAY W. OVERSTREET,
State Attorney.

ORANGE:	(A)	(B)	(C)	(D)	(E)
Homicide:					
Murder, first degree	7	1	1	2	2
Murder, second degree	6	—	—	1	—
Murder, third degree	2	—	—	—	—
Rape	1	1	—	1	—

- (A) Indictments and Informations.
 (B) No True Bills and No Informations.
 (C) Nolle Prosequi.
 (D) Convictions.
 (E) Acquittals.

OTHER CASES HANDLED

	Number
Criminal hearings attended	21
Habeas corpus hearings attended	2
Other cases not enumerated	3

Respectfully submitted,

MURRAY W. OVERSTREET,

State Attorney.

OSCEOLA:	(A)	(B)	(C)	(D)	(E)
Assault with intent to commit a felony	5	—	—	3	—
Breaking and entering	8	—	—	8	—
Carnal intercourse with unmarried female	1	—	—	—	—
Forgery	11	—	—	11	—
Homicide:					
Murder, first degree	2	—	—	1	—
Murder, second degree	1	—	—	2	—
Larceny	13	—	3	10	—
Lewd and lascivious conduct	1	—	—	1	—
Nonsupport or desertion	1	—	—	—	—
Resisting an officer	1	—	—	1	—
Shooting into dwelling	1	—	—	1	—
Worthless checks and drafts	5	—	1	4	—

OTHER CASES HANDLED

	Number
Appeals from lower court to circuit court	2
Criminal hearings attended	41

Respectfully submitted,

MURRAY W. OVERSTREET,

State Attorney.

ST. LUCIE:	(A)	(B)	(C)	(D)	(E)
Assault with intent to commit a felony	9	5	1	6	2
Bigamy	1	—	—	—	1
Breaking and entering	9	2	1	7	2
Crime against nature	3	—	—	3	—
Embezzlement	4	1	1	3	—
Forgery	3	—	—	3	—
Homicide:					
Murder, first degree	9	2	—	4	2
Murder, second degree	2	1	—	1	—
Manslaughter	1	1	—	—	1
Larceny	7	3	—	5	2
Lottery	1	—	1	—	—
Rape	1	—	—	1	—
Robbery	5	—	1	4	—

OTHER CASES HANDLED

	Number
Appeals from lower court to circuit court	1
Bond estreature proceedings	1
Criminal hearings attended	46
Habeas corpus hearings attended	12
Other cases not enumerated	5

(A) Indictments and Informations.

(B) No True Bills and No Informations.

(C) Nolle Prosequi.

(D) Convictions.

(E) Acquittals.

Respectfully submitted,
MURRAY W. OVERSTREET,
State Attorney.

SEMINOLE:	(A)	(B)	(C)	(D)	(E)
Arson	4	—	1	1	2
Assault with intent to commit a felony	10	—	1	9	2
Attempt to commit a felony	6	—	1	2	2
Bigamy	1	—	—	—	—
Breaking and entering	25	—	3	12	5
Bribery	1	—	—	—	—
False pretense	1	—	—	—	—
Forgery	8	—	1	6	—
Homicide:					
Murder, first degree	5	—	1	—	2
Murder, second degree	3	—	—	2	1
Kidnapping	1	—	—	—	—
Larceny	19	—	5	8	5
Mayhem	1	—	—	—	—
Nonsupport or desertion	27	—	—	—	—
Possession of unstamped beverages	1	—	—	—	—
Robbery	5	—	1	4	—

OTHER CASES HANDLED

	Number
Appeals from lower court to circuit court	3
Criminal hearings attended	9

Respectfully submitted,
MURRAY W. OVERSTREET,
State Attorney.

TENTH JUDICIAL CIRCUIT

Hardee County

Polk County

Highlands County

HARDEE:	(A)	(B)	(C)	(D)	(E)
Adultery	2	—	—	2	—
Aggravated assault	9	—	2	7	—
Arson	1	—	—	—	—
Assault with intent to commit a felony	24	—	5	17	2
Breaking and entering	5	—	1	4	—
Embezzlement	1	—	—	—	—
Fence cutting	1	—	1	—	—
Forgery	4	—	—	—	—
Gambling houses	1	—	—	—	—
Hit and run driver	2	—	—	2	—
Homicide:					
Murder, first degree	2	—	—	—	—
Murder, second degree	1	—	—	1	—
Killing animal of another	—	1	—	—	—
Larceny	4	—	—	—	—
Lewdness	7	—	—	7	—
Nonsupport or desertion	4	—	2	2	—
Prison escape	4	—	—	4	—
Robbery	2	—	—	2	—

- (A) Indictments and Informations.
(B) No True Bills and No Informations.
(C) Nolle Prosequi.
(D) Convictions.
(E) Acquittals.

OTHER CASES HANDLED

	Number
Appeals from lower court to circuit court	6
Bond estreature proceedings	2
Bond validation proceedings	8
Habeas corpus hearings attended	4
Other cases not enumerated	2

Respectfully submitted,

L. GRADY BURTON,
State Attorney.

HIGHLANDS:

	(A)	(B)	(C)	(D)	(E)
Adultery	4	3	2	2	—
Aggravated assault	44	9	4	38	2
Assault with intent to commit a felony	28	—	2	—	2
Breaking and entering	22	6	—	21	1
Burning woods	1	—	—	1	—
Carnal intercourse with unmarried female	2	—	1	1	—
Crime against nature	3	—	—	3	—
Destroying personal property	2	—	1	1	—
Embezzlement	5	—	—	5	—
Forgery	4	—	—	4	—
Gambling houses	3	—	—	3	—
Hit and run driver	3	—	—	3	—
Homicide:					
Murder, second degree	3	—	—	3	—
Larceny	15	4	—	15	—
Liquor	1	—	—	1	—
Lottery	7	—	—	7	—
Nonsupport or desertion	1	8	1	—	—
Prison escape	5	—	—	5	—
Rape	3	2	1	1	1
Receiving stolen property	—	3	—	—	—
Removing mortgaged property	1	—	—	1	—
Resisting arrest	2	—	—	2	—
Robbery	6	—	1	5	—
Miscellaneous crimes not otherwise listed	—	12	—	—	—

OTHER CASES HANDLED

	Number
Appeals from lower court to circuit court	4
Bond validation proceedings	8
Criminal hearings attended	24
Habeas corpus hearings attended	4

Respectfully submitted,

L. GRADY BURTON,
State Attorney.

POLK:

	(A)	(B)	(C)	(D)	(E)
Homicide:					
Murder, first degree	26	8	1	16	3
Murder, second degree	2	—	—	—	—
Rape	8	—	4	2	2

- (A) Indictments and Informations.
 (B) No True Bills and No Informations.
 (C) Nolle Prosequi.
 (D) Convictions.
 (E) Acquittals.

OTHER CASES HANDLED

	Number
Appeals from lower court to circuit court	41
Bond estreature proceedings	4
Bond validation proceedings	12
Criminal hearings attended	11
Habeas corpus hearings attended	9
Other cases not enumerated	18

Respectfully submitted,

L. GRADY BURTON,
State Attorney.

ELEVENTH JUDICIAL CIRCUIT

Dade County

Monroe County

DADE:	(A)	(B)	(C)	(D)	(E)
Assault with intent to commit rape	—	—	—	2	—
Homicide:					
Murder, first degree	26	5	2	5	7
Rape	16	3	1	8	3

OTHER CASES HANDLED

	Number
Appeals from lower court to circuit court	6
Appeals to supreme court	8
Assault with intent to commit murder	1
Bond estreature proceedings	1
Bond validation proceedings	16
Deaths investigated—alcoholism	5
Deaths investigated—natural	10
Declaratory judgment hearings attended	13
Disbarment proceedings	3
Extraditions (hearings attended)	3
Habeas corpus proceedings attended	54
Homicides investigated:	
Accidental	21
By person or persons unknown	2
Justifiable, coroner's verdict	22
Manslaughter, coroner's verdict	7
Second degree murder, coroner's verdict	6
Injunction proceedings attended	2
Narcotic proceedings	2
Parole commission reports sent in	11
Rapes investigated—dismissed—no case	36
Rapes investigated—no arrests	8
Sanity matters (Restoration, etc.) attended	40
Suicides investigated	24

Respectfully submitted,

GLENN C. MINCER,
State Attorney.

MONROE:	(A)	(B)	(C)	(D)	(E)
Homicide:					
Murder, first degree	2	2	—	—	—
Manslaughter	—	—	—	2	—
Rape	1	—	1	—	—

- (A) Indictments and Informations.
 (B) No True Bills and No Informations.
 (C) Nolle Prosequi.
 (D) Convictions.
 (E) Acquittals.

OTHER CASES HANDLED

Number

Appeals to supreme court bond validation proceedings	2
Assault with intent to commit murder	1
Bond validation proceedings	2
Hearings attended	20
Homicides:	
Accidental	23
Justifiable	1

Respectfully submitted,

GLENN C. MINCER,
State Attorney.

TWELFTH JUDICIAL CIRCUIT

Charlotte County
Collier County
DeSoto County
Glades County

Hendry County
Lee County
Manatee County
Sarasota County

CHARLOTTE:

(A) (B) (C) (D) (E)

Aggravated assault	1	—	—	—	—
Assault with intent to commit a felony	3	—	—	2	—
Breaking and entering	1	—	—	1	—
Embezzlement	2	—	—	—	—
Homicide:					
Murder, second degree	1	—	—	—	—
Larceny	4	—	—	4	—
Nonsupport or desertion	1	—	—	1	—
Worthless checks and drafts	1	—	—	1	—

OTHER CASES HANDLED

Number

Appeals from lower court to circuit court	1
Bond validation proceedings	1

Respectfully submitted,

CLYDE H. WILSON,
State Attorney.

COLLIER:

(A) (B) (C) (D) (E)

Aiding and abetting commission of a felony	1	—	—	1	—
Assault with intent to commit a felony	3	—	—	2	—
Attempt to commit a felony	1	—	1	—	—
Burglary	3	—	1	1	—
Homicide:					
Murder, second degree	3	—	—	3	—
Larceny	2	—	—	1	—
Shooting into automobile	1	—	—	1	—
Worthless checks and drafts	2	—	—	1	—

Respectfully submitted,

CLYDE H. WILSON,
State Attorney.

- (A) Indictments and Informations.
(B) No True Bills and No Informations.
(C) Nolle Prosequi.
(D) Convictions.
(E) Acquittals.

DESOTO:	(A)	(B)	(C)	(D)	(E)
Assault on child	1	—	—	—	—
Attempt to commit a felony	10	—	2	5	—
Bigamy	1	—	—	—	—
Breaking and entering	4	—	1	3	—
Forgery	8	—	—	6	—
Gambling houses	1	—	—	—	—
Homicide:					
Murder, first degree	1	—	—	1	—
Murder, second degree	3	—	—	1	—
Larceny	5	—	—	3	—
Lottery	1	—	—	—	—
Worthless checks and drafts	3	—	—	—	—

OTHER CASES HANDLED

	Number
Criminal hearings attended	12
Habeas corpus hearings attended	1

Respectfully submitted,

CLYDE H. WILSON,
State Attorney.

GLADES:	(A)	(B)	(C)	(D)	(E)
Attempt to commit a felony	1	—	—	1	—
Breaking and entering	2	—	—	2	—
Homicide:					
Murder, first degree	1	—	—	—	1

Respectfully submitted,

CLYDE H. WILSON,
State Attorney.

HENDRY:	(A)	(B)	(C)	(D)	(E)
Assault with intent to commit a felony	1	—	—	1	—
Attempt to commit a felony	4	—	—	3	1
Beverage law violation	1	—	—	1	—
Breaking and entering	4	—	—	4	—
Burglary	2	—	—	2	—
Defamation	2	—	—	2	—
Homicide:					
Murder, second degree	2	—	—	2	—
Larceny	1	—	—	1	—
Liquor	2	—	—	2	—
Recent labor law violation	1	—	—	1	—
Shooting into dwelling	1	—	—	1	—
Timber theft	1	—	—	—	—

OTHER CASES HANDLED

	Number
Bond validation proceedings	2
Criminal hearings attended	4

Respectfully submitted,

CLYDE H. WILSON,
State Attorney.

- (A) Indictments and Informations.
 (B) No True Bills and No Informations.
 (C) Nolle Prosequi.
 (D) Convictions.
 (E) Acquittals.

LEE:	(A)	(B)	(C)	(D)	(E)
Assault with intent to commit a felony	16	—	1	4	3
Breaking and entering	27	—	3	17	2
Embezzlement	5	—	1	2	—
Extortion	1	—	—	—	—
False pretense	2	—	—	—	—
Forgery	7	—	1	2	—
Homicide:					
Murder, second degree	2	—	—	2	—
Manslaughter	1	—	—	—	—
Larceny	13	—	4	6	1
Lottery	15	—	—	15	—
Mayhem	1	—	—	1	—
Nonsupport or desertion	7	—	1	2	—
Receiving stolen property	2	—	—	2	—
Worthless checks and drafts	7	—	1	4	—

OTHER CASES HANDLED

Bond validation proceedings	Number
Criminal hearings attended	2
	25

Respectfully submitted,

CLYDE H. WILSON,
State Attorney.

MANATEE:	(A)	(B)	(C)	(D)	(E)
Assault on child	4	—	—	3	—
Assault with intent to commit a felony	7	—	—	6	1
Assault with intent to murder	3	—	—	2	—
Auto theft	6	—	—	5	—
Beverage law violation	1	—	1	—	—
Bigamy	2	—	—	1	—
Breaking and entering	4	—	—	3	—
Burglary	6	—	—	6	—
Carnal intercourse with unmarried female	1	—	—	—	—
Embezzlement	3	—	—	3	—
False pretense	1	—	—	1	—
Forgery	4	—	—	4	—
Gambling	1	—	—	—	—
Homicide:					
Murder, second degree	3	—	—	2	—
Manslaughter	2	—	—	1	1
Larceny	15	—	1	12	1
Nonsupport or desertion	6	—	1	5	—
Receiving stolen property	19	—	—	18	—
Robbery	4	—	—	3	—

OTHER CASES HANDLED

Bond estreature proceedings	Number
Criminal hearings attended	2
Habeas corpus hearings attended	20
	6

Respectfully submitted,

CLYDE H. WILSON,
State Attorney.

- (A) Indictments and Informations.
 (B) No True Bills and No Informations.
 (C) Nolle Prosequi.
 (D) Convictions.
 (E) Acquittals.

SARASOTA:	(A)	(B)	(C)	(D)	(E)
Assault with intent to commit a felony	2	—	—	1	1
Attempt to commit a felony	7	—	—	3	2
Breaking and entering	23	—	—	19	2
Embezzlement	4	—	—	2	—
Forgery	7	—	—	3	—
Fourth conviction of felony	2	—	—	2	—
Gambling houses	1	—	—	1	—
Homicide:					
Murder, second degree	4	—	—	2	2
Incest	3	—	—	1	—
Larceny	10	—	—	10	—
Medical practice act violations	2	—	—	—	—
Nonsupport or desertion	6	—	—	2	—
Rape	1	—	—	1	—
Receiving stolen property	3	—	—	3	—
Robbery	6	—	—	6	—
Shooting into dwelling	1	—	—	1	—
Worthless checks and drafts	1	—	—	1	—

OTHER CASES HANDLED

	Number
Criminal hearings attended	2
Respectfully submitted,	
CLYDE H. WILSON,	
State Attorney.	

THIRTEENTH JUDICIAL CIRCUIT

Hillsborough County

HILLSBOROUGH:	(A)	(B)	(C)	(D)	(E)
Homicide:					
Murder, first degree	22	—	—	6	2
Murder, second degree	—	—	—	4	—
Manslaughter	—	—	—	2	—
Rape	7	—	—	5	1

OTHER CASES HANDLED

	Number
Appeals from lower court to circuit court	24
Bond estreature proceedings	8
Bond validation proceedings	11
Criminal hearings attended	10
Habeas corpus hearings attended	21
Other cases not enumerated	7

Respectfully submitted,

J. REX FARRIOR,
State Attorney.

FOURTEENTH JUDICIAL CIRCUIT

Bay County
Calhoun County
Gulf County

Holmes County
Jackson County
Washington County

- (A) Indictments and Informations.
(B) No True Bills and No Informations.
(C) Nolle Prosequi.
(D) Convictions.
(E) Acquittals.

BAY:	(A)	(B)	(C)	(D)	(E)
Adultery	2	—	1	—	—
Aggravated assault	18	6	2	12	1
Aiding an escape	—	1	—	—	—
Assault with intent to commit a felony	8	6	2	6	1
Breaking and entering	53	14	14	25	2
Carnal intercourse with unmarried female	1	—	1	—	—
Disposing of mortgaged property	2	3	1	—	—
Driving while drunk	1	3	—	2	—
Embezzlement	1	6	1	—	—
False pretense	1	10	1	—	—
Forgery	17	2	4	1	—
Hit and run	2	4	1	—	—
Homicide:					
Murder, first degree	3	—	—	2	—
Murder, second degree	6	5	2	4	—
Manslaughter	4	2	2	4	—
Larceny	31	33	7	17	1
Narcotic law violations	2	—	—	2	—
Nonsupport or desertion	22	9	6	6	—
Perjury	5	—	1	—	—
Rape	3	4	2	—	—
Robbery	6	6	1	3	—
Shooting into dwelling	1	4	—	4	1
Unlawful practice of pharmacy	1	—	—	1	—
Worthless checks and drafts	1	4	1	—	1

OTHER CASES HANDLED

	Number
Bond estreature proceedings	5
Bond validation proceedings	4
Criminal hearings attended	20
Habeas corpus hearings attended	8

Respectfully submitted.

L. D. McRAE,
State Attorney.

CALHOUN:	(A)	(B)	(C)	(D)	(E)
Aggravated assault	6	—	3	2	1
Assault with intent to commit a felony	6	—	1	2	1
Breaking and entering	2	—	—	—	—
Embezzlement	1	—	—	—	—
Forgery	2	—	—	2	—
Homicide:					
Murder, first degree	—	1	—	—	—
Murder, second degree	1	—	—	—	1
Manslaughter	2	1	—	—	1
Imputing a want of chastity to female	—	1	—	—	—
Larceny	8	—	—	4	1
Malfeasance in office	2	—	—	—	—
Nonsupport or desertion	7	1	—	5	—
Resisting an officer	1	—	—	—	1
Robbery	1	—	—	—	—
Shooting into dwelling	1	1	—	2	—
Unlawful assembly	—	4	—	—	—
Unlawfully burning woods	1	2	—	—	—

- (A) Indictments and Informations.
 (B) No True Bills and No Informations.
 (C) Nolle Prosequi.
 (D) Convictions.
 (E) Acquittals.

OTHER CASES HANDLED

Criminal hearings attended	Number 15
Habeas corpus hearings attended	1

Respectfully submitted,

L. D. McRAE,
State Attorney.

GULF:	(A)	(B)	(C)	(D)	(E)
Adultery	2	1	—	—	1
Assault with intent to commit a felony	5	1	—	2	1
Breaking and entering	10	—	1	8	—
Disposing of property subject to lien	1	—	—	—	—
Embezzlement	1	—	—	1	—
Forgery	3	—	—	3	—
Homicide:					
Murder, first degree	4	—	—	4	—
Murder, second degree	2	—	—	2	—
Manslaughter	2	—	1	1	—
Larceny	5	6	—	5	1
Nonsupport or desertion	11	—	—	—	1

OTHER CASES HANDLED

Criminal hearings attended	Number 4
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Respectfully submitted,

L. D. McRAE,
State Attorney.

HOLMES:	(A)	(B)	(C)	(D)	(E)
Aggravated assault	1	—	—	2	—
Assault with intent to commit a felony	7	—	—	1	5
Breaking and entering	4	—	1	2	—
Homicide:					
Murder, first degree	2	—	—	—	—
Murder, second degree	—	—	—	2	—
Manslaughter	1	2	—	—	1
Liquor	3	3	1	1	1
Nonsupport or desertion	5	1	—	3	—
Obstructing an officer	—	—	—	1	—

OTHER CASES HANDLED

Criminal hearings attended	Number 8
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Respectfully submitted,

L. D. McRAE,
State Attorney.

JACKSON:	(A)	(B)	(C)	(D)	(E)
Aggravated assault	9	—	—	6	2
Assault with intent to commit a felony	3	—	—	1	1
Breaking and entering	24	2	7	9	1
Conviction of fourth felony	1	—	—	1	—
Defacing a church	1	—	—	1	—

- (A) Indictments and Informations.
 (B) No True Bills and No Informations.
 (C) Nolle Prosequi.
 (D) Convictions.
 (E) Acquittals.

Disposing of mortgaged property	2	1	2	1	—
False pretense	1	1	—	1	—
Forgery	8	2	—	1	6
Gambling houses	2	—	—	1	—
Hit and run	5	1	2	1	1
Homicide:					
Murder, first degree	1	—	—	—	—
Murder, second degree	1	—	—	1	1
Manslaughter	5	—	—	4	—
Illicit intercourse	3	—	1	—	1
Liquor	30	3	2	20	2
Nonsupport or desertion	22	3	10	5	—
Obstructing an officer	2	—	—	—	—
Robbery	3	—	2	—	1
Shooting into dwelling	2	—	—	2	—

OTHER CASES HANDLED

	Number
Appeals from lower court to circuit court	6
Bond validation proceedings	1
Criminal hearings attended	8
Habeas corpus hearings attended	1

Respectfully submitted,

L. D. McRAE,
State Attorney.

WASHINGTON:	(A)	(B)	(C)	(D)	(E)
Adultery	1	—	—	1	—
Aggravated assault	8	3	2	7	—
Aiding an escape	2	—	—	—	—
Arson	6	3	—	5	—
Breaking and entering	4	2	1	3	—
Carnal intercourse with unmarried female	1	—	—	—	1
Conspiracy	1	—	—	—	1
Culpable negligence	1	—	—	—	1
Drunken driving	3	2	—	1	1
Embezzlement	1	—	—	1	—
False pretense	3	3	—	—	—
Forgery	7	—	—	7	—
Homicide:					
Murder, first degree	—	2	—	—	—
Murder, second degree	1	—	—	1	—
Larceny	6	10	1	5	—
Lewd and lascivious cohabitation	1	—	—	—	—
Nonsupport or desertion	3	3	—	2	1
Rape	1	—	—	—	—
Robbery	2	4	—	—	1
Worthless checks and drafts	1	—	—	1	—

OTHER CASES HANDLED

	Number
Bond validation proceedings	1
Criminal hearings attended	9
Other cases not enumerated	1

Respectfully submitted,

L. D. McRAE,
State Attorney.

- (A) Indictments and Informations.
 (B) No True Bills and No Informations.
 (C) Nolle Prosequi.
 (D) Convictions.
 (E) Acquittals.

FIFTEENTH JUDICIAL CIRCUIT

Broward County

Palm Beach County

BROWARD:	(A)	(B)	(C)	(D)	(E)
Assault with intent to commit a felony	6	—	1	4	1
Attempt to commit a felony	1	1	—	—	—
Beverage law violation	1	—	1	—	—
Breaking and entering	36	—	—	35	—
Conveying tools to jail to aid escape	1	—	—	1	—
Embezzlement	2	—	—	1	1
Forgery	5	—	—	5	—
Homicide:					
Murder, first degree	15	6	—	6	4
Murder, second degree	2	—	—	2	1
Manslaughter	6	3	—	4	2
Larceny	30	—	2	26	1
Lewd and lascivious acts	2	—	—	1	1
Mayhem	1	—	—	—	1
Nonsupport or desertion	3	—	—	2	—
Rape	7	2	—	3	2
Robbery	6	—	—	5	1

OTHER CASES HANDLED

	Number
Bond estreature proceedings	2
Bond validation proceedings	1
Criminal hearings attended	122
Habeas corpus hearings attended	2
Other cases not enumerated	5

Respectfully submitted,

PHIL O'CONNELL,
State Attorney.

PALM BEACH:	(A)	(B)	(C)	(D)	(E)
Homicide:					
Murder, first degree	7	2	—	7	—
Rape	1	—	1	1	—

OTHER CASES HANDLED

	Number
Habeas corpus hearings attended	6

Respectfully submitted,

PHIL O'CONNELL,
State Attorney.

- (A) Indictments and Informations.
 (B) No True Bills and No Informations.
 (C) Nolle Prosequi.
 (D) Convictions.
 (E) Acquittals.

REPORTS OF COUNTY SOLICITORS FOR YEARS 1945-1946, INCLUSIVE

DADE:

CRIMINAL COURT OF RECORD AND COURT OF CRIMES:

OFFENSE	(A)	(B)	(C)	(D)	(E)
Abortion	—	—	—	1	3
Adultery and fornication	—	—	14	9	—
Aggravated assault	—	7	31	92	32
Arson	—	—	—	3	2
Assault and battery	—	17	57	103	54
Assault with intent to commit a felony	—	3	27	54	23
Attempted felony	—	—	9	21	7
Bigamy	—	1	4	5	—
Bribery	—	—	—	—	2
Conspiracy	—	—	51	51	—
Contributing to delinquency of minor	—	2	5	15	3
Cosmetic and drug act violations	—	—	—	4	—
Crime against nature	—	—	9	13	2
Driving auto drunk	—	3	29	176	14
Drunk	—	6	56	507	16
Embezzlement	—	4	35	53	11
Extortion	—	—	1	1	—
False pretenses	—	1	6	21	—
Forgery	—	1	5	87	1
Gambling	—	2	13	177	15
Game law violations	—	—	4	44	—
Homicide:					
Murder, second degree	—	—	2	1	5
Manslaughter	—	2	7	13	9
Incest	—	—	—	1	—
Indecent assault on child	—	—	2	9	—
Indecent exposure	—	—	1	17	1
Larceny	—	23	126	428	71
Libel and defamation	—	1	2	2	2
Licenses, occupational	—	—	6	9	2
Lien laws	—	2	6	2	2
Liquor	—	5	55	79	13
Lottery	—	3	2	4	5
Malicious mischief	—	1	4	5	6
Mayhem	—	—	1	2	3
Miscellaneous	—	18	77	176	38
Motor vehicle laws	—	7	44	131	27
Narcotics	—	2	10	32	3
Nonsupport	—	—	25	3	2
Nuisance	—	—	2	2	2
Perjury	—	—	1	—	1
Prostitution	—	—	7	22	6
Rape	—	2	1	—	—
Receiving stolen property	—	1	13	32	8
Reckless driving	—	11	27	411	32
Robbery	—	2	30	64	13
Slot machines	—	—	5	20	2
Threatening communications	—	—	1	—	—

- (A) Indictments and Informations.
 (B) No True Bills and No Informations.
 (C) Nolle Prosequi.
 (D) Convictions.
 (E) Acquittals.

Trespass	—	1	9	22	9
Vagrancy	—	2	20	245	30
Venereal disease	—	—	—	1	—
Weapons	—	1	8	56	4
Worthless checks and drafts	—	5	61	159	7
Zoning and sanitary violations	—	1	41	55	26

Respectfully submitted,

ROBERT R. TAYLOR,
County Solicitor.

DUVAL:

CRIMINAL COURT OF RECORD:	(A)	(B)	(C)	(D)	(E)
Adultery	9	3	—	9	—
Aggravated assault	156	15	6	149	21
Arson	2	—	—	2	—
Assault and battery	162	36	8	137	17
Assault with intent to commit a felony	54	42	6	37	11
Bigamy	—	2	—	—	—
Breaking and entering	334	56	12	298	23
Carnal intercourse	2	—	—	2	—
Crime against nature	8	1	—	6	2
Driving while intoxicated	146	3	1	66	1
Drunk, vagrancy	191	37	1	185	5
Embezzlement	54	14	3	43	8
False pretense	20	11	2	16	2
Forgery	42	2	—	42	—
Fourth conviction of felony	7	—	—	7	—
Gambling houses	1	—	—	1	—
Game law violations	16	1	—	16	—
Homicide:					
Murder, second degree	8	3	1	11	4
Manslaughter	28	5	—	12	8
Larceny	556	70	22	491	43
Liquor	17	2	1	15	1
Narcotics	21	—	1	20	—
Nonsupport or desertion	9	12	—	8	1
Receiving stolen property	31	4	—	29	2
Reckless driving	206	10	—	205	1
Robbery	63	13	2	48	13
Traffic violations	—	16	5	128	4
Unlawful intoxication	466	45	21	430	15
Using automobile without consent of owner	25	2	—	25	—
Worthless checks and drafts	48	11	1	47	—

Respectfully submitted,

WAYNE E. RIPLEY,
County Solicitor.

ESCAMBIA:

CRIMINAL COURT OF RECORD:	(A)	(B)	(C)	(D)	(E)
Aggravated assault	158	—	29	114	13
Assault with intent to commit a felony	73	—	6	59	8
Attempt to commit a felony	13	—	2	6	—
Breaking and entering	135	—	18	111	6
Carnal intercourse	5	—	3	1	1

- (A) Indictments and Informations.
 (B) No True Bills and No Informations.
 (C) Nolle Prosequi.
 (D) Convictions.
 (E) Acquittals.

Crime against nature	4	—	2	1	1
Embezzlement	5	—	2	1	2
Forgery	19	—	5	13	1
Gambling houses	11	—	1	8	2
Homicide:					
Murder, second degree	6	—	1	5	—
Manslaughter	10	—	2	7	1
Larceny	301	—	16	122	6
Liquor	57	—	9	48	1
Narcotics	2	—	—	2	—
Nonsupport or desertion	5	—	—	4	1
Perjury	3	—	—	2	—
Receiving stolen property	23	—	9	13	1
Robbery	6	—	2	2	2
Miscellaneous crimes not otherwise listed	1546	—	78	1381	77

Respectfully submitted,

FORSYTH CARO,
County Solicitor.

HILLSBOROUGH:

CRIMINAL COURT OF RECORD:	(A)	(B)	(C)	(D)	(E)
Accessory after the fact	—	2	—	—	—
Adultery	2	2	—	2	—
Affray	9	—	3	3	3
Aggravated assault	67	17	10	61	10
Aiding an escapee	—	2	—	—	—
Arson	8	—	—	6	2
Assault and battery	37	12	2	25	5
Assault to commit manslaughter	—	—	—	3	—
Assault to murder	31	3	—	16	3
Assault to rape	1	—	—	1	—
Assault to rob	13	2	—	7	3
Attempt to break and enter	7	2	—	8	1
Attempt to escape	1	—	—	1	—
Beating board bill	3	—	—	2	—
Bigamy	1	—	—	2	—
Breach of peace	2	1	—	1	1
Breaking and entering	221	20	18	172	25
Burning to defraud	1	—	—	—	1
Buying and receiving stolen property	18	2	2	15	6
Carnal intercourse	3	1	—	2	—
Carrying concealed weapons	17	3	1	11	1
Conspiracy	7	—	—	10	—
Contempt	2	—	—	1	—
Contributing to delinquency of minor	5	1	—	2	3
Crime against nature	13	5	3	15	7
Cruelty to children	6	—	—	6	—
Culpable negligence	—	6	—	3	—
Destroying property	2	2	2	4	1
Disorderly conduct	—	1	—	—	—
Disturbing public worship	1	1	2	—	—
Driving drunk	152	4	5	105	18
Driving without license	34	3	3	26	1
Drunk and habitual drunk	4292	10	85	1919	48

- (A) Indictments and Informations.
 (B) No True Bills and No Informations.
 (C) Nolle Prosequi.
 (D) Convictions.
 (E) Acquittals.

Embezzlement	18	7	2	14	—
Entering without breaking	16	—	9	13	—
Escape	29	2	—	28	1
Extortion	—	1	—	—	—
Failing to register	7	1	—	6	1
Firearms violations	8	—	1	4	1
Food poisoning	1	—	—	—	1
Forgery	53	2	2	56	—
Gambling	17	2	1	12	7
Hoboing	2	—	—	2	—
Homicide:					
Murder, second degree	9	—	—	4	4
Manslaughter	24	7	1	18	11
Impersonating an officer	1	—	—	1	—
Improper exhibition of dangerous weapon	1	—	—	2	—
Indecent assault	10	4	3	3	4
Indecent exposure	7	2	—	2	3
Killing animal of another maliciously	—	2	—	—	—
Larceny	467	44	36	379	61
Leaving scene of accident	20	1	2	10	4
Lewd and lascivious conduct	17	3	6	12	1
Liquor law violations	12	5	3	5	1
Motor vehicle violations	15	3	1	12	—
Narcotics	9	—	—	8	1
Obstructing justice	3	—	3	—	—
Obtaining lodging with intent to defraud	—	1	—	—	—
Obtaining money under false pretenses	8	3	—	8	1
Operating business without license	1	1	—	1	—
Perjury	—	—	1	1	—
Profanity	28	3	2	18	3
Prostitution	52	3	7	39	7
Railroad commission act violation	—	1	—	—	—
Reckless driving	203	14	16	108	23
Removing property under lien	—	1	—	—	—
Resisting arrest	14	—	2	9	2
Robbery	50	13	4	35	3
Sanitary code violation	—	1	—	—	—
Shooting into dwelling	1	—	—	1	—
Threatening bodily injury	1	1	—	—	—
Throwing deadly missile	1	1	—	—	1
Trespass	6	6	1	6	1
Unemployment compensation violation	—	—	4	2	—
Unlawful practice of pharmacy	5	—	—	5	—
Using automobile without consent of owner	29	2	2	29	2
Vagrancy	79	3	15	65	5
Withholding support	9	12	1	7	—
Worthless checks and drafts	22	—	—	21	—

Respectfully submitted,

LUTHER W. COBBEY,
County Solicitor.

MONROE:

CRIMINAL COURT OF RECORD:

	(A)	(B)	(C)	(D)	(E)
Affray	8	—	—	7	1
Aggravated assault	16	—	1	10	4

- (A) Indictments and Informations.
 (B) No True Bills and No Informations.
 (C) Nolle Prosequi.
 (D) Convictions.
 (E) Acquittals.

Assault and battery	54	—	6	33	7
Beverage law violations	30	—	3	19	5
Breaking and entering	9	—	—	9	—
Drunken driving	12	—	—	9	2
Drunkenness	38	—	—	37	—
Embezzlement	2	—	1	—	—
Entering without breaking	7	—	—	6	—
Failure to report a motor accident	1	—	—	1	—
False pretense	1	—	—	1	—
Firearms violations	2	—	—	2	—
Forgery	1	—	—	1	—
Fornication	2	—	—	2	—
Gambling houses	10	—	—	10	—
Homicide:					
Manslaughter	2	—	—	2	—
Larceny	38	—	1	26	3
Motor vehicle violations	101	—	3	87	8
Nonsupport or desertion	5	—	—	4	—
Obtaining lodging with intent to defraud	1	—	—	1	—
Open profanity	9	—	—	8	—
Possessing slot machines	4	—	—	2	1
Possession of lewd and obscene prints	1	—	—	1	—
Reckless driving	43	—	1	30	3
Resisting arrest	1	—	—	1	—
Robbery	4	—	—	—	1
Soliciting for purposes of prostitution	1	—	—	1	—
Speeding	8	—	—	8	—
State beauty culture law violation	1	—	—	1	—
Temporarily using personal property of another	9	—	—	9	—
Trespass	2	—	—	2	—
Unlawful assault upon minor child	2	—	—	1	1
Vagrancy	51	—	2	46	1
Worthless checks and drafts	3	—	—	3	—

Respectfully submitted,

ALLAN B. CLEARE, JR.,
County Solicitor.

ORANGE:

CRIMINAL COURT OF RECORD:	(A)	(B)	(C)	(D)	(E)
Adultery	2	—	—	2	—
Affray and assault and battery	68	—	—	68	—
Aggravated assault	16	—	—	15	1.
Assault with intent to commit a felony	8	—	—	7	1
Attempt to commit a felony	1	—	—	1	—
Breaking and entering	82	—	—	81	1
Carnal intercourse	3	—	—	3	—
Crime against nature	2	—	—	2	—
Drunkenness	482	—	—	482	—
Embezzlement	10	—	—	9	1
Escape	14	—	—	14	—
Exhibiting deadly weapons	18	—	—	18	—
False pretense	2	—	—	2	—
Fish and game law violations	40	—	—	38	2

- (A) Indictments and Informations.
 (B) No True Bills and No Informations.
 (C) Nolle Prosequi.
 (D) Convictions.
 (E) Acquittals.

Forgery	56	—	—	56	—
Gambling houses	21	—	—	21	—
Homicide:					
Murder, second degree	5	—	—	2	3
Manslaughter	7	—	—	5	2
Larceny	137	—	—	130	7
Liquor	29	—	—	29	—
Lottery	7	—	—	7	—
Malicious injury to personal property	2	—	—	2	—
Narcotics	28	—	—	28	—
Nonsupport or desertion	6	—	—	6	—
Open profanity	3	—	—	3	—
Receiving stolen property	8	—	—	8	—
Resisting arrest	1	—	—	1	—
Temporary use of personal property	23	—	—	23	—
Traffic violations	866	—	—	857	9
Trespass	10	—	—	9	1
Vagrancy	3	—	—	3	—
Worthless checks and drafts	33	—	—	33	—

OTHER CASES HANDLED

	Number
Criminal hearings attended	52
Habeas corpus hearings attended	22

Respectfully submitted,

O. RAYMOND ELLARS,
County Solicitor.

PALM BEACH:

CRIMINAL COURT OF RECORD:	(A)	(B)	(C)	(D)	(E)
Abortion	3	—	2	—	—
Accessory to felony	9	—	4	4	—
Adultery	58	—	17	35	—
Aggravated assault	214	—	32	213	4
Arson	2	—	1	—	—
Assault and battery	80	—	8	63	2
Assault with intent to commit a felony	119	—	13	39	1
Attempt to commit a felony	13	—	3	8	—
Beating board bill	2	—	1	—	—
Beauty culture law violations	2	—	1	1	—
Bigamy	3	—	—	3	—
Breaking and entering	180	—	23	146	—
Cigarette tax violation	1	—	1	—	—
Concealed weapons	47	—	7	37	1
Crime against nature	8	—	4	4	—
Cruelty to animals	1	—	—	1	—
Drunkenness	271	—	18	259	—
Embezzlement	9	—	1	3	—
Engaging in lewdness	5	—	—	5	—
Entering without breaking	14	2	19	—	—
Escaping prison	9	—	1	8	—
Extortion	2	—	—	—	—
Failure to have children attend school	3	—	—	3	—
False pretense	41	—	1	26	—
Firearms violation	1	—	—	1	—

- (A) Indictments and Informations.
 (B) No True Bills and No Informations.
 (C) Nolle Prosequi.
 (D) Convictions.
 (E) Acquittals.

Fish and game law violations	34	—	19	31	—
Forgery	35	✓	3	25	—
Fourth offender	1	—	—	1	—
Gambling houses	44	—	7	—	—
Homicide:					
Murder, second degree	17	—	6	5	1
Manslaughter	14	—	6	12	—
Impersonation	1	—	—	1	—
Incest	1	—	—	1	—
Indecent exposure	2	—	—	2	—
Killing a dog	1	—	1	—	—
Larceny	298	—	46	221	1
Lewd and lascivious association	2	—	2	2	—
Liquor	55	—	21	30	3
Malicious mischief	5	—	3	2	—
Mayhem	1	—	—	1	—
Motor vehicle violations	50	—	2	40	—
Narcotics	5	—	1	4	—
Nonsupport or desertion	83	—	23	51	2
Open profanity	6	—	3	—	—
Operating business without license	1	—	2	—	—
Possessing explosives	1	—	—	1	—
Railroad commission act violations	9	—	—	11	—
Receiving stolen property	27	—	7	17	—
Robbery	31	—	10	8	—
Shooting into dwelling	3	—	—	2	—
Stock law violations	2	—	—	2	—
Temporarily using property of another	32	—	2	30	—
Traffic and tag violations	681	—	30	66	12
Transporting for immoral purposes	4	—	—	—	1
Unlawfully engaging in prostitution	16	—	—	10	—
Unlawfully taking turtles	7	—	—	5	—
Vagrancy	20	—	5	15	—
Worthless checks and drafts	45	—	7	20	—

Respectfully submitted,

W. E. ROEBUCK,
County Solicitor.

PASCO:

CRIMINAL COURT OF RECORD:	(A)	(B)	(C)	(D)	(E)
Accessory before the fact	1	—	—	1	—
Affray	6	—	—	6	—
Aggravated assault	10	2	—	8	—
Assault and battery	5	—	1	3	1
Assault with intent to commit a felony	5	—	1	4	—
Breaking and entering	3	—	2	1	—
Carnal intercourse with unmarried female	1	—	1	—	—
Concealed weapons	2	—	—	2	—
Driving while intoxicated	3	—	—	3	—
Driving without license	7	—	—	7	—
Embezzlement	2	—	1	1	—
Escape	1	—	1	—	—
Exhibiting deadly weapon	1	—	—	1	—
Fishing without license	4	—	—	4	—

- (A) Indictments and Informations.
 (B) No True Bills and No Informations.
 (C) Nolle Prosequi.
 (D) Convictions.
 (E) Acquittals.

Gambling houses	8	6	—	2	—
Homicide:					
Manslaughter	2	—	1	1	—
Hunting without license	1	—	—	1	—
Improper lights	1	—	—	1	—
Larceny	11	—	—	11	—
Liquor	82	9	—	73	—
Nonsupport or desertion	4	—	—	3	1
Pistol without license	1	—	—	1	—
Profane language	8	—	1	7	—
Receiving stolen property	2	—	1	—	1
Reckless driving	14	2	—	12	—
Robbery	2	—	—	2	—
Threatening communications	1	—	—	1	—
Trespass	1	—	—	—	1
Unauthorized possession of fruit box	1	—	1	—	—
Unlawful use of motor vehicle	4	—	1	2	1
Vagrancy	6	—	—	6	—
Worthless checks and drafts	1	—	—	—	1

OTHER CASES HANDLED

Bond estreature proceedings	Number
Criminal hearings attended	19
	45 or 50

Respectfully submitted,

T. H. GETZEN,
County Solicitor.

POLK:

CRIMINAL COURT OF RECORD:

	(A)	(B)	(C)	(D)	(E)
Adultery	13	7	—	13	—
Affray	18	—	—	16	—
Aggravated assault	103	70	6	78	2
Arson	3	4	—	2	—
Assault and battery	25	—	2	19	—
Assault with intent to commit a felony	35	14	2	33	3
Attempt to commit a felony	9	7	1	8	—
Beating board bill	2	—	—	2	—
Bigamy	2	1	1	1	—
Breaking and entering	87	23	8	74	2
Bribery	1	—	—	1	—
Carnal intercourse	3	4	—	3	—
Concealed weapons	1	—	—	1	—
Conspiracy	—	1	—	—	—
Contributing to delinquency of minors	1	—	—	1	—
Crime against nature	2	—	—	2	—
Drunken driving	66	—	—	57	1
Drunkenness	162	—	6	219	—
Embezzlement	11	22	1	7	—
Escape	9	—	—	9	—
Exhibiting dangerous weapon	2	—	—	1	—
Extortion	—	1	—	—	—
False pretense	2	4	—	1	—
Fish law violations	10	—	—	6	—

- (A) Indictments and Informations.
 (B) No True Bills and No Informations.
 (C) Nolle Prosequi.
 (D) Convictions.
 (E) Acquittals.

Forgery	25	5	1	23	—
Fornication	6	—	—	6	—
Gambling houses	142	11	2	128	—
Hit and run driver	1	—	—	1	—
Homicide:					
Murder, second degree	1	—	—	1	—
Murder, third degree	1	—	—	1	—
Manslaughter	2	—	—	1	1
Incest	4	4	—	4	—
Larceny	161	56	7	148	1
License law violation	1	—	—	1	—
Liquor	206	51	15	158	6
Lottery	10	—	1	9	—
Narcotics	8	—	2	6	—
Nonsupport or desertion	16	46	2	11	—
Other traffic violations	92	—	2	55	—
Possession of slot machine	2	—	—	2	—
Profanity	4	—	—	4	—
Prostitution	8	—	1	6	—
Rape	—	1	—	—	—
Receiving stolen property	6	8	4	2	—
Reckless driving	87	—	2	28	—
Robbery	12	2	—	12	—
Sunday law violations	4	—	—	4	—
Unauthorized use of automobile	6	—	—	6	—
Vagrancy	61	—	5	44	1
Worthless checks and drafts	26	31	1	23	—
Miscellaneous crimes not otherwise listed	2894	474	67	2707	20

Respectfully submitted,

GUNTER STEPHENSON,
County Solicitor.

- (A) Indictments and Informations.
 (B) No True Bills and No Informations.
 (C) Nolle Prosequi.
 (D) Convictions.
 (E) Acquittals.

REPORTS OF CLERKS OF CIRCUIT COURTS

COUNTY	Circuit	NAME OF CLERK	Common Law Cases Undisposed of	Chancery Cases Undisposed of	Common Law Cases Filed	Chancery Cases Filed	Common Law Cases Disposed of	Chancery Cases Disposed of	All Other Cases Disposed of
Alachua	8th	George E. Evans	52	77	114	1,160	81	973	Inc. others
Baker	8th	Joe Dobson	20	13	20	464	11	390	18
Bay	14th	W. S. Weaver	87	148	102	778	30	350	40
Bradford	8th	A. J. Thomas	103	315	17	1,660	13	1,490	39
Brevard	9th	G. M. Simmons	32	266	50	1,933	22	1,722	Inc. others
Broward	15th	Ted Cabot	655	327	260	1,657	137	1,237	not reported
Calhoun	14th	J. A. Peacock	20	81	23	216	20	179	10
Charlotte	12th	E. H. Scott	1	7	7	169	3	160	Inc. others
Citrus	5th	James E. Connor	3	20	4	211	2	188	5
Clay	4th	R. L. Tilley	15	76	43	661	39	543	10
Collier	12th	Edmund F. Scott	6	3	10	26	4	23	0
Columbia	3rd	Hugh B. Summers	31	118	53	340	42	290	Inc. others
Dade	11th	E. B. Leatherman	89	690	821	16,812	262	13,360	Inc. others
De Soto	12th	Leslie E. Avant	5	30	9	113	9	99	27
Dixie	3rd	Cauley C. Copeland	4	7	18	151	4	91	4
Duval	4th	Leonard W. Thomas	153	705	841	8,524	505	6,114	332
Escambia	1st	Langley Bell	264	936	260	1,034	179	688	272
Flagler	7th	Ralph E. Harbert	9	13	15	148	8	119	not reported
Franklin	2nd	W. P. Dodd	2	5	13	117	8	110	5
Gadsden	2nd	F. F. Morgan	8	10	13	277	10	208	35
Gilchrist	8th	R. E. Davis	2	3	1	26	1	17	0
Glades	12th	Mrs. D. S. Weeks	1	12	3	62	3	50	0
Gulf	14th	J. R. Hunter	0	0	12	117	8	112	2
Hamilton	3rd	Miss Thelma Lewis	4	42	20	94	16	76	2
Hardee	10th	Ben Coker	466	556	26	697	17	571	18
Hendry	12th	Wm. T. Hull	1	3	8	73	4	64	0
Hernando	5th	H. C. Mickler	10	37	6	160	3	130	3
Highlands	10th	H. T. Piety	581	790	39	494	29	564	23
Hillsborough	13th	Chas. H. Pent	145	1,483	481	5,922	309	4,686	Inc. others
Holmes	14th	J. H. Little	33	40	16	132	8	112	11
Indian River	9th	Douglas Baker	151	177	20	239	24	214	29
Jackson	14th	Doe Grant	60	267	52	565	35	440	40

Jefferson.....	2nd	Clyde H. Sauls.....	5	9	8	28	5	29	7
Lafayette.....	3rd	Sidney C. Edwards..	0	9	1	44	2	34	2
Lake.....	5th	Geo. J. Dykes.....	1,326	1,105	95	821	81	735	not reported
Lee.....	12th	D. T. Farabee.....	9	88	51	541	34	509	68
Leon.....	2nd	Geo. G. Crawford...	185	240	323	1,136	116	843	43
Levy.....	8th	Jack L. Meeks.....	9	12	24	122	17	94	not reported
Liberty.....	2nd	W. G. Larkins.....	0	1	3	1	1	0	2
Madison.....	3rd	D. F. Burnette, Jr..	124	55	13	232	5	185	not reported
Manatee.....	12th	Lloyd M. Hicks.....	not reported	not reported	73	651	38	373	Inc. others
Marion.....	5th	Carlyle Ausley.....	320	not reported	82	886	30	558	not reported
Martin.....	9th	J. R. Pomeroy.....	16	16	55	141	24	92	5
Monroe.....	11th	Ross C. Sawyer.....	6	111	39	840	21	680	83
Nassau.....	4th	T. W. Brown.....	9	25	11	176	6	132	0
Okaloosa.....	1st	Leron T. Rice.....	13	59	56	442	0	280	17
Okeechobee....	9th	Mrs. Mabel P. Raulerson.....	6	16	4	81	6	60	0
Orange.....	9th	Arthur W. Newell...	112	307	197	1,182	120	700	18
Osceola.....	9th	John L. Oyerstreet..	20	25	20	275	15	240	18
Palm Beach....	15th	J. Alex Arnette.....	210	1,140	371	2,907	207	2,291	Inc. others
Pasco.....	6th	A. J. Burnside.....	not reported	not reported	17	487	9	389	Inc. others
Pinellas.....	6th	Ray E. Green.....	210	1,149	305	3,168	166	2,958	75
Polk.....	10th	D. H. Sloan, Jr....	74	179	249	3,449	157	2,960	not reported
Putnam.....	7th	W. A. Williams, Jr..	12	13	46	442	14	364	not reported
St. Johns.....	7th	Hiram Faver.....	not reported	not reported	43	2,189	23	2,031	not reported
St. Lucie.....	9th	W. R. Lott.....	13	58	70	519	47	394	27
Santa Rosa....	1st	Claude E. Locklin...	2	20	60	284	40	193	10
Sarasota.....	12th	W. A. Wynne.....	126	389	65	817	22	611	5
Seminole.....	9th	O. P. Herndon.....	52	273	44	994	28	795	Inc. others
Sumter.....	5th	Roy Caruthers.....	45	67	12	241	16	235	20
Suwannee.....	3rd	J. L. McMullen.....	39	89	12	154	25	146	7
Taylor.....	3rd	Felix A. Parker.....	9	24	19	196	10	160	not reported
Union.....	8th	C. B. Hayes.....	9	16	13	70	8	58	4
Volusia.....	7th	Jess Mathas.....	339	448	215	2,256	82	1,724	Inc. others
Wakulla.....	2nd	Gilbert J. Langston..	6	14	14	104	10	79	not reported
Walton.....	1st	Miss Kate Gillis...	5	52	33	258	20	208	26
Washington....	14th	Eli J. Harrell.....	4	20	12	164	5	130	19

REPORT OF CLERK OF CIVIL COURT OF RECORD DADE COUNTY

Number of common law cases on file and undisposed of from January 1, 1926 to January 1, 1947	6,330
Number of common law cases filed during the biennium of 1945- 1946	3,407
Number of common law cases disposed of during the biennium of 1945-1946	1,537

Respectfully submitted,

W. CECIL WATSON, Clerk.

REPORT OF CLERK OF CIVIL COURT OF RECORD DUVAL COUNTY

Number of common law cases on file and undisposed of January 1, 1945	628
Number of common law cases filed during the biennium of 1945- 1946	847

Respectfully submitted,

K. L. HARTLEY, Clerk.

REPORT OF CLERK OF COURT OF RECORD ESCAMBIA COUNTY

Number of common law cases on file and undisposed of January 1, 1945	116
Number of chancery cases on file and undisposed of January 1, 1945	510
Number of common law cases filed during the biennium of 1945-1946	207
Number of chancery cases filed during the biennium of 1945-1946	2,037
Number of common law cases disposed of during the biennium of 1945-1946	116
Number of chancery cases disposed of during the biennium of 1945-1946	1,537
Number of all other cases and special proceedings, such as adoption, free dealers, etc., disposed of during the biennium of 1945-1946, not included in the above	72

Respectfully submitted,

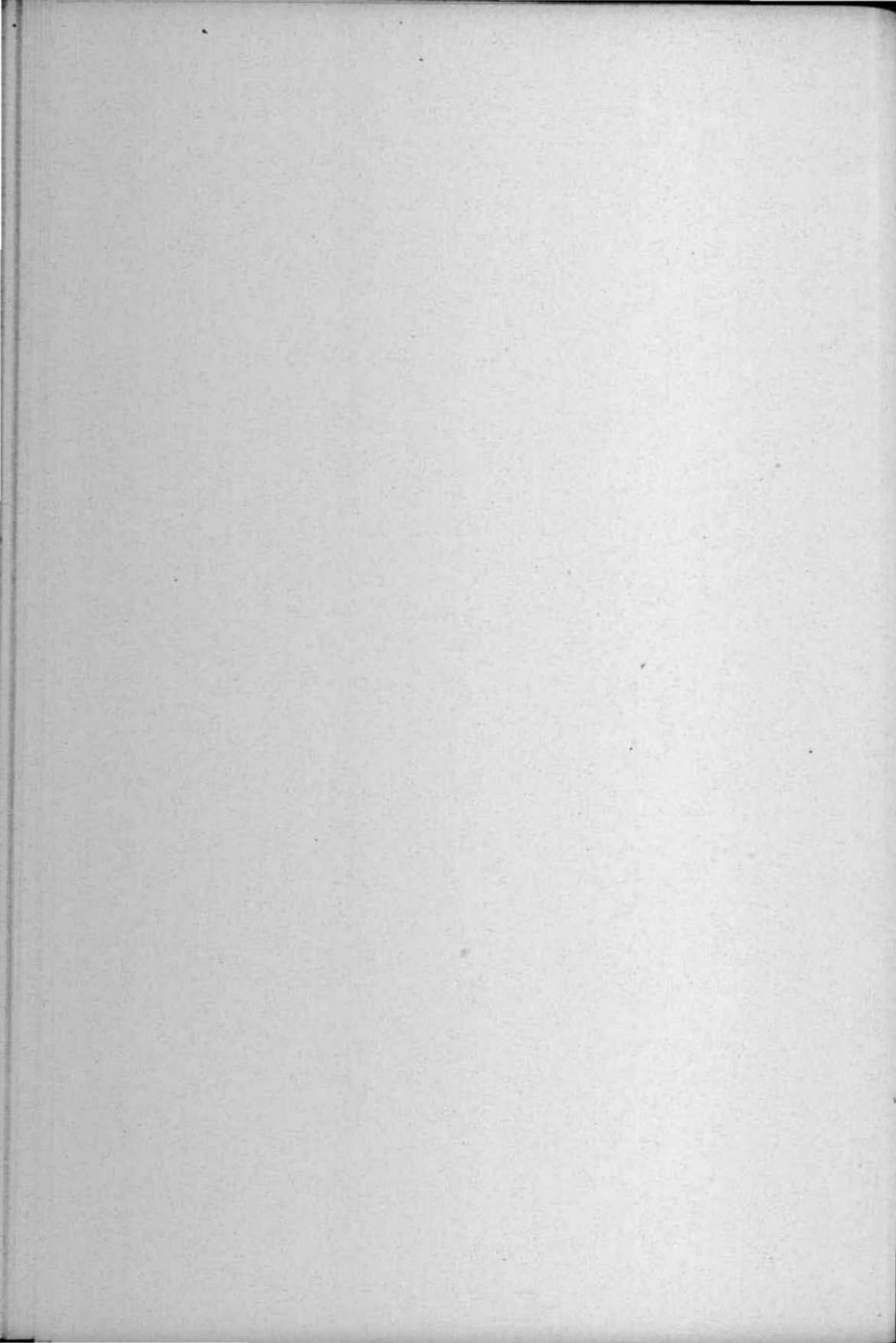
GEORGE TRAWICK, Clerk.

REPORT OF CLERK OF STATUTORY COURT OF RECORD PASCO COUNTY

Number of common law cases filed during the biennium of 1945-1946	20
Number of common law cases disposed of during the biennium of 1945-1946	10

Respectfully submitted,
A. J. BURNSIDE, Clerk.

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